

**EXAMINING THE MULTISTAKEHOLDER PLAN  
FOR TRANSITIONING THE INTERNET ASSIGNED  
NUMBER AUTHORITY**

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**HEARING**

BEFORE THE

**COMMITTEE ON COMMERCE,  
SCIENCE, AND TRANSPORTATION  
UNITED STATES SENATE**

**ONE HUNDRED FOURTEENTH CONGRESS**

**SECOND SESSION**

**MAY 24, 2016**

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

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## **EXAMINING THE MULTISTAKEHOLDER PLAN FOR TRANSITIONING THE INTERNET ASSIGNED NUMBER AUTHORITY**

**TUESDAY, MAY 24, 2016**

U.S. SENATE,  
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,  
*Washington, DC.*

The Committee met, pursuant to notice, at 10:02 a.m. in room SR-253, Russell Senate Office Building, Hon. John Thune, Chairman of the Committee, presiding.

Present: Senators Thune [presiding], Wicker, Blunt, Rubio, Ayotte, Fischer, Sullivan, Moran, Johnson, Gardner, Daines, Cantwell, McCaskill, Klobuchar, Blumenthal, Schatz, and Markey.

### **OPENING STATEMENT OF HON. JOHN THUNE, U.S. SENATOR FROM SOUTH DAKOTA**

The CHAIRMAN. Good morning. This hearing will commence. Thank you all for being here.

Two years ago, the Commerce Department's National Telecommunications Information Administration, or NTIA, announced its intention to transition the functions of the Internet Assigned Number Authority, or IANA, to the global multistakeholder community. Since that time, the multistakeholder community, made up of businesses, technical experts, academics, and civil societies, spent more than 26,000 working hours on the IANA transition proposal and held more than 600 related meetings and calls.

At the outset of this hearing, I want to acknowledge the hard work undertaken by many stakeholders, some of whom are here today as witnesses, in taking on the daunting task of developing the transition proposal. Regardless of where one stands on the transition, we should recognize the difficult work that has been done and the ongoing commitment that will be needed if the transition is to be completed in a way that addresses the important concerns that have been raised about the future governance of the Internet.

On March 10, the Internet Corporation for Assigned Names and Numbers, or ICANN, forwarded to NTIA for review the transition proposal developed by the global community of Internet stakeholders. NTIA set a target of 90 days to complete its review, which is expected to be completed on June 10, whereupon NTIA will issue a report stating its determination as to whether the proposal meets the criteria that NTIA outlined when it first announced the transi-

tion, such as the requirement that the proposal maintain the openness and global interoperability of the Internet.

If NTIA approves the transition, ICANN expects to produce an implementation report by August 15. The existing IANA contract is set to expire on September 30, 2016, unless NTIA acts to extend it or Congress acts to delay the transition. These dates are rapidly approaching, which is why I called this hearing today to examine the stakeholders' transition proposal.

Our committee held an earlier hearing on the proposed IANA transition in February 2015. At that hearing, I said I would review any IANA transition plan to make sure it both meets the requirements laid out by NTIA and that it adopts meaningful accountability reforms, such as curtailing government involvement in apolitical governance matters; providing additional oversight tools to the multistakeholder community; and adopting an independent dispute resolution process.

Last year, I also introduced the DOTCOM Act along with Senators Schatz, Wicker, and Rubio, which our committee approved on a bipartisan basis. With that bill, which also passed the House of Representatives by a vote of 378 to 25, we all made clear that any transition plan must not replace the role of the NTIA with a government-led or intergovernmental organization. Further, the DOTCOM Act would require any transition plan to maintain the security, stability, and resiliency of the Internet domain name system.

I hope to hear today from each of our witnesses whether they believe the proposed IANA transition plan developed by the multistakeholder community meets these requirements as well as whether it satisfies NTIA's criteria. In particular, I am interested to learn whether the stakeholder community has delivered a proposal with accountability reforms strong enough to give Congress and the American people confidence that the time has come to privatize the IANA functions.

At last year's IANA hearing, I said that the goal of everyone here is the same. We want one global Internet that is not fragmented nor hijacked by authoritarian regimes. Whether the IANA transition goes forward or not, I know that everyone wants to ensure all Internet users can continue to have complete faith that the IANA functions will be carried out effectively and seamlessly long into the future.

We have a very distinguished panel here today—and I want to thank them for their time and effort in their testimony—representing a diverse variety of perspectives, professional experiences, and personal views. I'm looking forward to hearing from each of you.

With that, I'll turn to our Ranking Member, Senator Schatz, for any comments he would like to make.

**STATEMENT OF HON. BRIAN SCHATZ,  
U.S. SENATOR FROM HAWAII**

Senator SCHATZ. Thank you, Mr. Chairman. Good morning.

The Internet has its roots in America, but its social, economic, and human rights benefits depend on the Internet's global nature.

A successful IANA transition will ensure that the global community continues to benefit from an open Internet.

The Internet by its very nature is a network of networks that exists solely because millions of stakeholders and users continue to agree that a free and open Internet is essential and that the multistakeholder approach to global Internet governance actually works. Yet there are those who feel that the government itself, specifically the Department of Commerce, must maintain control over the IANA functions and through that, somehow, the Internet totally.

It is ironic to me that so-called “small government types” want a Commerce Department bureau to oversee the technical underpinnings of the Internet. If the goal is to preserve and grow a free and open global Internet, you can’t have an agency bureau run it forever, even if it’s just the technical functions.

The consensus plan for decades through many administrations, Democratic and Republican, has always been to turn the IANA functions over to the private sector. In fact, this Congress and the U.S. Government at large have expressed unanimous support for the multistakeholder model of international Internet governance. There’s no question that the transition must move forward.

Now, the Internet community has submitted a proposal to NTIA for the transition, and technical experts, civil society, industry, and others from the global Internet community developed this proposal over several years. These stakeholders, large and small, believe that this plan and the IANA transition itself are essential to preserve and advance the global Internet.

This community of experts has also expressed that delay or termination of the transition would undermine our nation’s commitment to the free and open Internet. And they warn that it could even result in a fractured Internet that no longer serves as a vital engine of commerce and innovation.

These views should not be dismissed lightly. It’s important that we stay on track with this transition which can be successfully completed this fall. The timing allows for NTIA to conduct a full review of the plan to make sure it complies with NTIA and congressional requirements for the transition. These requirements are clear and will deliver a new governance structure that will preserve the multistakeholder model that is at the heart of global Internet governance. I look forward to NTIA’s review that will determine if the plan makes the necessary reforms to ensure ICANN’s accountability to the global multistakeholder community.

Finally, I appreciate the Chairman holding today’s hearing. He and I have partnered with several Senators on the DOTCOM Act in making sure that the transition goes smoothly. We take the Commerce Committee’s oversight of this matter very seriously, and I look forward to the hearing.

The CHAIRMAN. Thank you, Senator Schatz.

We do, as I said, have a very distinguished panel of witnesses today, and I’m going to ask them to make their opening statements. First off, we’ll hear from Michael Beckerman, who is President and CEO of the Internet Association; followed by Steve DelBianco, who is Executive Director of NetChoice; the Honorable David Gross, who is the former U.S. Coordinator for International Communications and Information Policy at the State Department;

Rick Manning, who is President for Americans for Limited Government; Brett Schafer with the Heritage Foundation; and Andrew Sullivan, who is Chair of the Internet Architecture Board.

So I'll ask you all as much as you can—we've got a large panel today—if you could confine your opening remarks to as close to 5 minutes as possible, and we will certainly, of course, submit your entire written statements for the record. But we want to maximize the opportunity for members of the Committee to ask questions.

So we'll start on my left, on your right, with Mr. Beckerman. Please proceed.

**STATEMENT OF MICHAEL BECKERMAN, PRESIDENT AND CEO,  
INTERNET ASSOCIATION**

Mr. BECKERMAN. Thank you. Chairman Thune, Ranking Member Nelson, and distinguished members of the Committee, thank you for inviting me to testify before you today at this important hearing on the IANA transition. My name is Michael Beckerman, and I am the President and CEO of the Internet Association.

The IA represents almost 40 of the world's leading Internet companies. Our mission is to foster innovation, promote economic growth, and empower people through the free and open Internet. I'd like to summarize my remarks and ask that my full written testimony be submitted for the record.

The Internet Association and its member companies have been actively involved in the IANA transition to ensure that the final proposal is good for our member companies, good for users around the world, and the Internet writ large. This is a plan that will transition the IANA functions in a way that will keep the Internet safe, secure, reliable, and resilient.

Our goal throughout this process has been to ensure that a post-transition ICANN is fortified with the appropriate separation of powers necessary to protect the system from capture by any one stakeholder group, thus preserving a free and open Internet. We share the concern for members of this committee that foreign governments, specifically China or Russia or even the U.N.'s ITU, want to bring the Internet under their control. But we want to make sure that everybody recognizes that a delay or blocking this transition makes this outcome more likely, not less.

The transition we're talking about today is designed specifically to keep a government takeover from happening. Simply put, the best way to protect the Internet from governments and political interests and the parade of horrors that we'll talk about today is to empower the multistakeholder process by moving forward the transition. The successful transition of IANA functions serves U.S. interests, because it will ensure that the people with the most at stake in the Internet's future growth are entrusted with the responsibility to protect the Internet and given the power to do so.

This is not a foregone conclusion. As you know, there are countries that want to impose a top-down, state-centric governance model for the Internet. If they have their way, the global and open Internet as we know it today will cease to exist. This will be bad for Internet companies, bad for users, and bad for the global economy, to say nothing of free expression around the world.



To be clear, the Internet Association and our members have not been a rubber stamp on this process. We'll be the first to argue that a transition alone is not enough. The Internet Association agrees that the IANA transition must be done with carefully crafted proposals that provide for a successful transition.

The companies, members of civil society, technologists, and users that drive the Internet worked together to craft proposals that are better than the status quo. I'd like to quickly highlight three ways these proposals ensure that a post-transition ICANN is truly accountable to the community and an improvement over ICANN's current structure.

One, ICANN's mission will be explicitly limited to the operation of the Domain Name System and the policies that are reasonably necessary to facilitate its openness, interoperability, resilience, and stability. The proposal also explicitly states that anything not articulated in the bylaws would be outside of ICANN's mission.

Second, for the first time, this proposal distinguishes between ICANN bylaws and fundamental bylaws. Included here are mechanisms establishing new accountability checks and balances, and this designation of fundamental bylaws cannot be amended by Board action alone.

And, third, ensuring limited government and less government control. The Government Advisory Committee, GAC, will be more constrained in the future than it is presently. This will significantly limit the GAC's ability to overturn multistakeholder policy by a number of reforms, including that GAC advice must be issued without objection, it must be accompanied by a rationale, and the Board must not violate its own bylaws when implementing GAC advice.

Ensuring the proper limitations on ICANN is important to the future of the Internet, and the Internet Association and the multistakeholder community will continue to be intimately engaged with the transition process and the implementation as it moves forward.

Thank you for having me testify today. I look forward to the questions the Committee may have.

[The prepared statement of Mr. Beckerman follows:]

PREPARED STATEMENT OF MICHAEL BECKERMAN, PRESIDENT AND CEO,  
INTERNET ASSOCIATION

### Introduction

Chairman Thune, Ranking Member Nelson, and distinguished members of the Committee, thank you for inviting me to testify before you at this important hearing on the Internet Assigned Numbers Authority (IANA) transition.

My name is Michael Beckerman, and I am the President and CEO of the Internet Association. The Internet Association represents almost 40 of the world's leading Internet companies.<sup>1</sup> Our mission is to foster innovation, promote economic growth, and empower people through the free and open Internet. As the voice of the world's leading Internet companies, our job is to ensure that all stakeholders understand the benefits the Internet brings to our economy.

The companies represented by the Internet Association depend on the global, open Internet. Accordingly, the Internet Association and its member companies have been actively involved in the IANA transition process to ensure that the final proposal is good for our member companies, users around the world, and the Internet writ

<sup>1</sup> The Internet Association's members include Airbnb, Amazon, Coinbase, DoorDash, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Google, Groupon, Handy, IAC, Intuit, LinkedIn, Lyft, Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Snapchat, Spotify, SurveyMonkey, Ten-X, TransferWise, TripAdvisor, Turo, Twitter, Uber Technologies, Inc., Yahoo!, Yelp, Zenefits, and Zynga.

large. This is a plan that will transition the IANA functions to the global multi-stakeholder community—and remove unnecessary government involvement in the management of the engine of the 21st century digital economy—in a way that will keep the Internet safe, security, reliable, and resilient. We know this because we were involved in making sure the proposal accomplished these goals. Alongside our direct engagement in the IANA transition process, the Internet Association is also a member of the ICANN Business Constituency.<sup>2</sup>

I will address my testimony today in three parts, which are also important questions for the Committee to consider as it moves forward:

- *First*, are U.S. interests best served by an IANA transition?
- *Second*, do the IANA transition proposals sent from the Internet Corporation for Assigned Names and Numbers (ICANN) to NTIA this March ensure a successful transition?
- *Third*, what issues should a post-transition ICANN focus on in the short to long term?

The IANA transition has been long contemplated, beginning in 1997, when the U.S. Government first moved to privatize Internet technical functions in an effort to promote innovation and competition online. Our goal throughout this process has been to ensure that a post-transition ICANN is aligned with the stringent criteria set forth in 2014 by the National Telecommunications and Information Administration (NTIA) and is fortified with the appropriate separation of powers necessary to protect the system from capture by any one stakeholder group, thus preserving a free and open Internet.

#### **U.S. Interests Are Better Served By A Successful IANA Transition**

The successful transition of the IANA functions serves U.S. interests because it will ensure that people with the most at stake in the Internet's future growth—the small and medium businesses, the technologists, the companies and members of civil society, and individual users—are entrusted with the responsibility to ensure the open Internet, and are given the powers to do so.

This is not a foregone conclusion. There are countries that want to impose a top-down, state-centric governance model for the Internet. These countries believe that something as powerful as the Internet needs to be tamed by governments, or in some cases fragmented so that networks stop at national borders. If they have it their way, the global and open Internet as we know it will cease to exist. This will be bad for Internet companies, bad for Internet users, and bad for the global economy—to say nothing of free expression and human rights around the world.

The Internet Association believes that a robust multistakeholder model is the best method to maintain an Internet free from government control. Maintaining the U.S. Government's "special" role—which has always hidden the reality that it was the Internet community itself that was primarily responsible for keeping the Internet working around the world—could encourage other governments to break off and create their own systems, endangering the seamless functionality and openness of the global Internet.

Fragmentation of the Internet would impede the free flow of information online and free speech worldwide, and would have political, economic, social, and cultural costs to society.<sup>3</sup> The risks to the multistakeholder model should a transition not proceed are significant, and as such, the transition should be supported.

Failure to implement a successful IANA transition will serve to undermine the multistakeholder model, potentially stripping power from a model that has helped make the Internet the success it is today. It could further expose Internet governance to the whims of individual governments around the world looking to fill the void of a failed IANA transition, in turn creating a risk to the economic, social, and cultural engine that we all agree must be protected. Instead, we must focus on not only moving forward with a transition, but on all stakeholders creating an ecosystem for success in a post-transition world.

<sup>2</sup>The mission of the Business Constituency is to promote the development of an Internet that promotes user confidence, that the Internet is a safe place to do business, is competitive in the supply of registry and registrar services, and is technically stable, secure, and reliable. The Business Constituency supported the final proposals by the IANA Stewardship Transition Coordination Group (ICG) and Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability).

<sup>3</sup>See Julius Genachowski and Gordon Goldstein, "'Global' Internet Governance Invites Censorship," (April 3, 2014) available at: <http://www.wsj.com/articles/SB10001424052702303978304579471670854356630>

### **IANA Stewardship Transition Coordination Group (ICG) Proposals Match Principles For Successful Transition**

A transition alone is not enough: the Internet Association agrees that the IANA transition must be done with carefully crafted proposals that provide for a successful transition.

In March 2014, when NTIA announced that it intended to transition the ICANN functions to a global multistakeholder community, NTIA told ICANN that the transition proposal must have broad community support and address the following four principles:

- Support and enhance the multistakeholder model;
- Maintain the security, stability, and resiliency of the Internet DNS;
- Meet the needs and expectations of the global customers and partners of the IANA services; and
- Maintain the openness of the Internet.

NTIA also stated that it would not accept a proposal that replaces the NTIA role with a government-led or an intergovernmental organization solution. These criteria for the transition are well-founded principles for the success of a transition.

The companies, members of civil society, technologists, and users that drive the Internet worked together to craft proposals that meet these criteria, and ICANN delivered proposals on both the IANA transition and enhanced ICANN accountability to NTIA for review in March 2016. To highlight, here are four examples of the way these proposals create the checks and balances needed to ensure that post-transition ICANN is truly accountable to the community, even without a special role for NTIA:

- Under the Accountability Proposal submitted to NTIA, ICANN's mission is explicitly "limited to coordinating the development and implementation of policies that are designed to ensure the stable and secure operation of the Domain Name System and are reasonably necessary to facilitate its openness, interoperability, resilience, and/or stability."<sup>4</sup> Helpfully, the proposal also explicitly states that anything not articulated in the bylaws would be outside ICANN's mission.
- The proposal for the first time distinguishes between ICANN bylaws and fundamental bylaws. Included in the fundamental bylaws are mechanisms establishing new accountability checks and balances and changes to ICANN's mission. This designation of fundamental bylaws matters because fundamental bylaws cannot be amended by board action alone.
- The proposal creates a further check on ICANN by improving the Independent Review Process (IRP) and Request for Reconsideration (RFR) mechanisms. As we know from the U.S. experience, judicial review of decisions is a very important tool in our democracy. The counterpart to judicial review in the ICANN system is IRP. Under the Accountability Proposal, the current IRP mechanism is independent arbitration that ensures that ICANN does not go beyond its limited mission through its actions and does not violate its bylaws. Under the Accountability Proposal, this arbitration mechanism is strengthened to make it more accessible and less costly. It is also made permanent through the establishment of a standing panel of independent experts with expertise in ICANN-related fields.
- The Governmental Advisory Committee (GAC) will be more constrained in the future than it is presently. This will significantly limit the GAC's ability to overturn multistakeholder policy:
  - that GAC advice be issued without objection in order to compel the Board to attempt to seek a mutually agreeable solution if the Board does not accept that advice;
  - that GAC advice must be accompanied by a rationale; and
  - that the Board must not violate its own bylaws when implementing GAC advice.

These restraints represent significant reforms to the way the GAC issues advice, and more than outweigh raising the threshold for the Board to reject GAC advice is raised to 60 percent. Additionally, while the GAC may participate in Empowered

<sup>4</sup>CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, ICANN, (Feb. 23, 2016) at 26 available at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>

Community processes, it may not participate as a decisional entity in any matter related to the Board's implementation of GAC advice.

The transition proposals satisfy NTIA's stringent criteria. They satisfy our condition that any transition happen in a thoughtful way that protects the open Internet and removes unnecessary government involvement. Put simply, the proposals ensure that the same community of innovators, entrepreneurs, and users who made the Internet will be entrusted with keeping it safe for future generations.

#### **Priorities For The Post-Transition ICANN**

As the IANA transition proceeds, our companies—and the rest of the global Internet community—are going to stay intimately involved and will keep close watch on the implementation of the accountability proposals.

Successful implementation of what the proposals for the Internet Association includes:

- First, ICANN, under the leadership of its new CEO, should demonstrate a clear commitment to the Accountability Proposals in the first one hundred days post-transition. This will serve as an important signal to all stakeholders that that it intends to honor both the letter and the spirit of the transition.
- Second, ICANN must prioritize not only Workstream 1, but also the Workstream 2 proposals. This latter Workstream is not yet complete and includes several very important issues for the multistakeholder community going forward. As one important stakeholder in ICANN—the GNSO—explained, Workstream 2 issues “remain vitally important and must be budgeted and supported at a level sufficient to ensure their development and implementation.”<sup>5</sup>
- Third, the new ICANN CEO should within his first 100 days in office send a clear signal to the multistakeholder community at the next ICANN gathering in Helsinki that ICANN will not engage in mission creep beyond its core mission statement and that it honors this fundamental bylaw and the clarity it brings to the multistakeholder community. Of particular concern to Internet Association members is that a post-transition ICANN would become a new forum for policing and enforcement beyond its core mandate. Specifically, ICANN should leave intellectual property content policing and enforcement to the stakeholders better equipped to handle these issues.

Ensuring the proper limitations on ICANN is important to the future of the Internet and the future of other international multistakeholder communities that wish to keep the Internet free and open for future generations.

Thank you for having me testify on this important issue. I look forward to any questions you may have.

The CHAIRMAN. Thank you, Mr. Beckerman.  
Mr. DelBianco?

#### **STATEMENT OF STEVE DELBIANCO, EXECUTIVE DIRECTOR, NETCHOICE**

Mr. DELBIANCO. Thank you, Chairman Thune and members of the Committee. I'm Steve DelBianco, Executive Director of NetChoice, a trade association representing the leading online and e-commerce companies. And I'm deeply involved at ICANN, having been elected six times as the policy chair for the business constituency, and I represent commercial stakeholders on the working group that developed the accountability proposal.

Let me start by thanking this committee for approving the DOTCOM Act last June. When ICANN's gathering was happening in Argentina, when I told the 1,500 people in the room that the DOTCOM Act required implementation of the community's proposal, everyone stood to applaud. So let the record show there was a standing ovation for the U.S. Congress in Buenos Aires.

<sup>5</sup>Thomas Rickert, Mathieu Weill, León Felipe Sánchez Ambía, *Transmittal of results of GNSO Council consideration of CCWG-Accountability Supplemental Final Proposal*, (Mar. 9, 2016) at 10, available at <http://gns0.icann.org/en/correspondence/bladel-to-ccwg-accountability-chairs-09mar16-en.pdf>

[Laughter.]

Mr. DELBIANCO. Let me also thank the members of this committee for your serious questions about the transition. The good news is that wherever your concerns actually relate to the functions of policies of ICANN and IANA, I will describe how your concerns are addressed.

First, there's some general angst, asking the question: does the expiration of IANA give away the U.S. Internet? Well, in the 1980s, American engineers developed the recipe for Internet protocol, and they promptly gave that recipe to the world. That enabled engineers anywhere in the world to create their own IP network and connect to the Internet, and the U.S. doesn't own the Internet any more, Mr. Chairman, than South Dakota owns the recipe for chislic or cubed meat.

The U.S. Government did create ICANN as a way to internationalize and privatize management of the Domain Name System. However, it is neither sustainable or necessary for the U.S. Government to retain its unique role forever, and, in fact, retaining the role increases the risks you are worried about.

Second, let me describe why ICANN will maintain its legal presence in the United States. This is something this committee probed in your February 2015 hearing, and you got a verbal assurance from ICANN's CEO, but we looked for stronger stuff, belts and suspenders, and the belts are in the ICANN bylaws, which state that the principal office for the business of ICANN shall be in Los Angeles. The suspenders are in the Articles of Incorporation, where it says ICANN, "is organized under California nonprofit public benefit corporation law." And our proposal requires 75 percent community approval to change that Article of Incorporation.

Third, the proposal will not see an increase in the power of governments. Just after NTIA's announcement of transition, NetChoice proposed stress tests to evaluate new accountability mechanisms. A prominent stress test was where the GAC could change to majority voting from its consensus method. In response, we locked in the consensus method, we added one more Board vote to reject consensus advice, and we exclude the GAC from the community decisions to challenge a Board decision on accepting the GAC's advice.

Some governments oppose these limits on GAC influence. The France Minister of IT complained recently, "This will marginalize states in the decisionmaking processes of ICANN, especially compared to the role of the private sector." Well, France is right. The full package of accountability measures sufficiently cabins governmental influence and fully meets NTIA's criteria.

Fourth, the proposal would not increase government censorship of the Internet. Recent moves by the Chinese government to control domestic domain name registration is troubling to all of us since it could fragment the Internet and isolate China's businesses and citizens. But the Chinese government's new policies are not an attempt to influence ICANN, because the Chinese government censorship works only on the edge of the Internet when traffic crosses China's physical borders. So neither China nor other governments can extend censorship to the core of the Internet so long as our

multistakeholder community controls ICANN policymaking and holds ICANN's Board accountable.

And then, finally, a significant delay in this transition would create far more risks than benefits. Some of you worry that the proposal would create a radically different governance structure for ICANN. But the proposal is somewhat complicated. I'll acknowledge that. But it is rooted in California law in order to extend legal powers to the community that ICANN is designed to serve.

A delay to test community powers—there's no expectation when the community would exercise the new powers to challenge a Board decision. These are extraordinary measures. Nor does it make sense to delay two years just to see how Work Stream 2 turns out. The new bylaws give the community the power to force reforms on ICANN at any time. So the only way to pause and evaluate all changes the community would ever make in the future would be to delay the transition forever.

But a long-term delay of transition would rekindle the fire at the United Nations, who sees the legacy U.S. Government role as something they should be doing. With the transition, we eliminate the role where one government has the unique role, and the U.N. could not longer point to the U.S. role and say they should step into those shoes.

I'll close by thanking you for your committee's deep engagement on this transition and for backing the multistakeholder community. Your letters and the hearing has made this a better process, and it's now ready for completion. I look forward to your questions.

[The prepared statement of Mr. DelBianco follows:]

PREPARED STATEMENT OF STEVE DELBIANCO, EXECUTIVE DIRECTOR, NETCHOICE

I am Executive Director of NetChoice, an association of leading online businesses.<sup>1</sup> At state, federal, and international fora, NetChoice promotes the integrity and availability of the Internet. We've attended 32 ICANN meetings and I'm serving a 6th term as policy chair for ICANN's Business Constituency. I've attended 9 Internet Governance Forum (IGF) meetings and testified in 8 Congressional hearings on ICANN and Internet governance, including 3 hearings specifically on the IANA transition and ICANN Accountability.

NetChoice members depend upon a secure Internet address system that's resilient to cyber attacks and abuse. We need an Internet that works around the globe—free from censorship, discriminatory regulation, and taxation. We need policies that are predictable and enforceable, facilitating innovation and creativity while protecting consumers. I will focus on three points today:

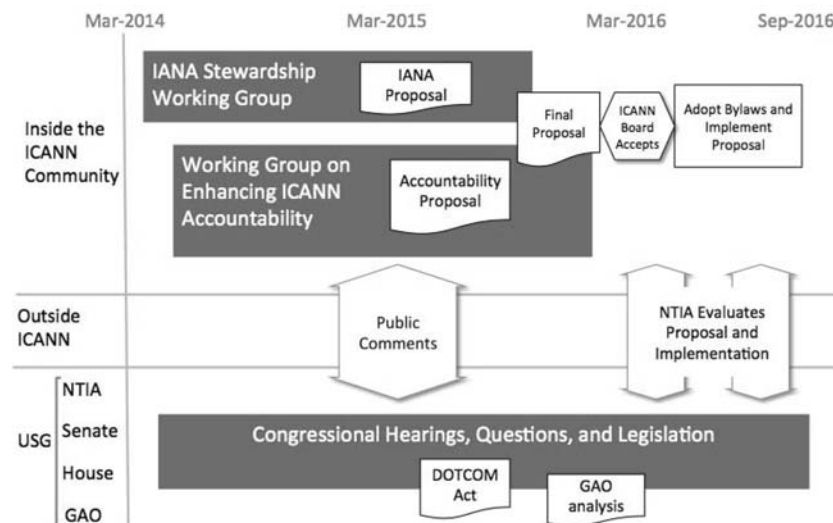
1. Over 18 years and three administrations, the U.S. Government has use light-touch oversight over ICANN. However, it is neither sustainable nor necessary for the U.S. to retain its unique role forever. In fact, retaining this unique role increases the risk of Internet fragmentation and government overreach. At NTIA's request, the Internet community created proposals to let ICANN loosen ties to the U.S. Government and strengthen its accountability to the global Internet user community and keeping core Internet functions free from governmental control.
2. NTIA's requirements for this transition guided the design of new mechanisms to: manage core Internet functions; hold ICANN accountable; and prevent government capture *after* the transition. Congress' role in this transition began with questions about accountability and stress tests, such as the guidance provided by this committee in your Feb-2015 hearing. Your committee backed the community with the DOTCOM Act, insisting that NTIA require ICANN to adopt the multistakeholder proposals *as a condition of the transition*.

<sup>1</sup> See <http://www.NetChoice.org>. This statement reflects the view of NetChoice and does not necessarily represent the views of any individual member company.

3. The community's proposal meets NTIA requirements and reduces governments' ability to override community consensus with its advice to ICANN's board. While we have nearly completed ICANN Bylaws to implement the proposal, a few implementation tasks need to be finished in the months ahead. This transition will for the first time make ICANN accountable to the technologists, businesses, civil society, and users who depend upon the Internet to drive economic growth and social evolution around the world. This is a significant improvement on the ICANN accountability we have today.

### 1. Where are we in this transition process for ICANN and IANA?

This committee has led Senate oversight of NTIA's transition plan, which can be visualized with this timeline:



When ICANN's board accepted our transition proposals and forwarded them to NTIA in March, the timeline leading up to the IANA contract expiration date on 30-Sep was tight, but doable:

- 20-Apr: Draft new bylaws posted for public comment period of 30 days.
- Late May: Evaluate public comments and ICANN board approves new bylaws.
- 10-Jun: NTIA evaluates adopted bylaws and reports to Congress in time for review before recess in mid-July. Berkman Center review expected to be part of this report.
- 15-Aug: NTIA evaluates *implementation* of community proposals, since this is the 45-day notice period for NTIA to extend the IANA contract, if needed.

The new bylaws will give the community powers to ensure these measures can be implemented—even if ICANN's board and management were to object. Next month, the ICANN community will begin designing *Work Stream 2* accountability measures, addressing transparency, diversity, and human rights.

### 2. How did we get to this point?

In the Annex to this statement we have summarized key events in the 18-year evolution of ICANN. We chronicle the escalating resentment of other governments over the unique role retained by the U.S., leading to the 2009 termination of U.S. oversight agreements and replacement with the *Affirmation of Commitments*. The diagram below shows today's multiple contractual ties and connections between ICANN and its global stakeholders.



The present arrangement reflects growing independence for ICANN, despite its two bilateral agreements with NTIA—the IANA Contract and Affirmation of Commitments (see above). Then, the 2013 Snowden revelations—though not unique to the U.S. and entirely unrelated to the stewardship of the IANA functions—stoked international concerns that led to the administration’s decision to relinquish the legacy link between ICANN and the U.S. Government—the IANA functions contract.

### 3. NTIA’s announced transition for IANA functions and ICANN accountability

In March 2014, the Commerce Department announced that it would transition its stewardship of the Internet Assigned Numbers Authority (IANA) functions to the global multistakeholder community. Positive global response was immediate, signaling that this move, at this time, might relieve some pressure from foreign governments that were demanding the U.S. end its unique U.S. role and give governments and the U.N. a greater role in IANA and ICANN oversight.

NTIA asked ICANN to develop a transition plan to shift stewardship of IANA functions to “the global multistakeholder community,” saying the transition proposal must have broad community support and satisfy four principles in replacing NTIA’s role<sup>2</sup>:

- Support and enhance the multistakeholder model
- Maintain the security, stability, and resiliency of the Internet DNS
- Meet the needs and expectation of the global customers and partners of IANA services
- Maintain the openness of the Internet

NTIA also added a statement that it would not give up IANA control if the plan developed by ICANN would place other governments in the legacy role of the U.S. With the experience of the last 18 years, it’s appropriate for the U.S. to impose these principles and to prevent any government-led organization from replacing the former U.S. role *after* the transition.

At the same time, NTIA and most stakeholders recognized that NTIA’s existing IANA contract provides a broader accountability framework for ICANN, and that ac-

<sup>2</sup>Press Release, “NTIA Announces Intent to Transition Key Internet Domain Name Functions”, March 14, 2014, at <http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>



countability enhancements should be developed and adopted in parallel with the transition. After NTIA's 2014 announcement, the Internet community and ICANN developed two tracks to respond to the challenge (as shown on the timeline on page 2):

*IANA Stewardship track:* Placing the global Internet community in the role historically held by NTIA in the IANA contract with ICANN.

*ICANN Accountability track:* Giving the global Internet community more power to hold the ICANN corporation accountable because NTIA will lose the leverage associated with the IANA contract once it expires.

On each track, the community is comprised of representatives of ICANN's recognized Advisory Committees and Stakeholder Organizations, including business; governments; and civil society.

*The IANA Stewardship Track:* ICANN structured the IANA track to have community groups with customers of the numbers, protocol parameters, and naming functions. They began meeting in Oct-2014 and published a final proposal in Oct-2015, with these elements:

- Create a new legal entity to contract with ICANN to operate IANA naming functions
- Establish a customer committee to monitor the performance of IANA functions
- Establish a periodic review of the IANA Functions, embedded in ICANN bylaws
- Empower the community select a new operator for the IANA Functions, if needed

Notably, the IANA naming proposal relies upon enhanced community powers in the ICANN Accountability Track to hold ICANN to its new obligations.

*The ICANN Accountability Track:* Beginning in Dec-2014, ICANN stakeholders named representatives to a cross-community working group (CCWG) representing the companies, technical experts, civil society activists, and users that are driving the Internet's growth and depend on the free and open Internet. (I serve as the representative of Commercial Stakeholders on the CCWG). After more than 200 meetings and calls, and over 12,000 e-mails over 14 months, the 200 participants in CCWG published a final proposal in Feb-2016 giving the community new powers to ensure ICANN was answerable to more than just itself.<sup>3</sup> New powers for the community include the ability to:

- Inspect ICANN's internal documents and records
- Challenge board actions via Independent Review Panels whose decisions are binding
- Veto bylaw changes proposed by the ICANN board
- Approve any changes to ICANN Fundamental Bylaws (deemed core to ICANN's governance structure) and Articles of Incorporation
- Veto strategic plans and budgets proposed by the ICANN board
- Control the periodic reviews required by the *Affirmation of Commitments*
- Remove individual ICANN board directors
- Recall the entire ICANN board, as a last-resort measure

ICANN's lawyers and the community's independent legal counsel jointly drafted new ICANN bylaws, which the CCWG reviewed and published for comment on 20-Apr-2016. (NetChoice supports the draft bylaws, subject to a few minor refinements.) The comment period closed 21-May, after which the bylaws may be revised to reflect comments, and then to the ICANN board for formal acceptance.

In the next section we summarize questions and concerns raised by members of this committee as well as hearings and legislation handled by the committee, regarding the announced transition of IANA and enhancing ICANN accountability.

#### **4. Transition and accountability concerns raised by members of this committee**

This committee and its members have engaged early and often in transition discussions, with letters and hearings that have shaped the process, as summarized below:

- Ten present members of this committee were among 35 Senators who wrote NTIA in Apr-2014 to reiterate the 2012 joint congressional resolution sup-

<sup>3</sup>Final Accountability Proposal, at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>

porting the multistakeholder model, and to ask tough questions about this transition: *why, by what authority, when, how, and what about potential risks?*<sup>4</sup>

- In May–2014 Senator Rubio was joined by 7 committee members calling for a hearing on NTIA’s transition decision<sup>5</sup>.
- In Jul–2014 Senators Thune and Rubio wrote to ICANN chairman Stephen Crocker, recommending several reforms at ICANN:<sup>6</sup>
  1. The transition should not allow governments to increase their influence
  2. Keep policy development separate from technical IANA functions
  3. Increase threshold for board decisions to 4/5 of voting directors
  4. Give the community additional transparency and oversight tools
  5. Improve the independent dispute resolution process (IRP)
  6. Bylaws should enshrine ICANN’s obligations under the *Affirmation of Commitments*
- This committee held a critical hearing in Feb–2015, where members pressed ICANN’s CEO Fadi Chehadé and NTIA’s Larry Strickling on several points:<sup>7</sup>
  1. Sen. Thune emphasized that the historical U.S. role must not be replaced by a government-led structure.
  2. Senators Thune and Blunt queried ICANN’s commitment to retain its U.S. headquarters.
  3. Sen. Fischer questioned Chehadé on threshold for board rejection of government advice
  4. Sen. Thune and others suggested that the Affirmation of Commitments be made permanent by incorporating its reviews in the ICANN bylaws.
- On 25–Jun–2015, this committee favorably reported S. 1551, the DOTCOM Act that passed the House two days earlier by an overwhelming margin of 378 to 25.<sup>8</sup> This legislation would require ICANN to adopt the multistakeholder community proposals before NTIA could complete the IANA transition.
- In Sep–2015 Senator Cruz led a bicameral request for GAO to determine whether the administration has the power to relinquish IANA functions.<sup>9</sup>
- In Feb–2016 Senators Cruz, Lankford, and Lee wrote to ICANN, objecting to actions they believe supported Chinese Internet censorship.<sup>10</sup> ICANN’s response<sup>11</sup> was then followed by another letter from the same Senators on 3–Mar–2016, referring to China’s latest regulations for Internet domain registrations.<sup>12</sup>
- On 4–Apr–2016, Senators Cruz, Lankford, and Lee wrote to ICANN demanding answers to questions they had raised in their previous letter.<sup>13</sup>

<sup>4</sup> 2–Apr–2014, “Thune, Rubio Demand Answers from Administration on Internet Transition”, at <http://www.thune.senate.gov/public/index.cfm/2014/4/thune-rubio-demand-answers-from-administration-on-internet-transition>

<sup>5</sup> 22–May–2014, “Rubio, Commerce Republicans Seek Answers On Future Of Internet Governance”, at <http://www.rubio.senate.gov/public/index.cfm/press-releases?ID=23503316-cea1-4bce-a4e6-af02ea864470>

<sup>6</sup> 31–Jul–2014, Letter from Senators Thune and Rubio to ICANN Chairman Stephen Crocker, at <https://www.icann.org/en/system/files/correspondence/thune-rubio-to-crocker-31jul14-en.pdf>

<sup>7</sup> 25–Feb–2015, Senate Commerce Committee hearing on M–S model of Internet Governance, video and statements at <http://www.commerce.senate.gov/public/index.cfm/hearings?ID=683924AE-83D7-4BF4-922A-CDECB9556BA9>, hearing transcript at <https://www.gpo.gov/fdsys/pkg/CHRG-114shrg98129/html/CHRG-114shrg98129.htm>

<sup>8</sup> 23–Jun–2015, Roll call vote on HR 805, at <http://clerk.house.gov/evs/2015/roll377.xml>

<sup>9</sup> 28–Sep–2015, Sen. Cruz Leads Bicameral Letter Asking GAO to Determine Whether Obama Administration Has Power to Give Away the Internet, at [http://www.cruz.senate.gov/?p=press\\_release&id=2453](http://www.cruz.senate.gov/?p=press_release&id=2453)

<sup>10</sup> 4–Feb–2016, Letter to ICANN CEO, at <https://www.icann.org/en/system/files/correspondence/cruz-et-al-to-chehadé-04feb16-en.pdf>

<sup>11</sup> 19–Feb–2016, ICANN CEO response letter, at <https://www.icann.org/en/system/files/correspondence/chehadé-to-cruz-et-al-19feb16-en.pdf>

<sup>12</sup> 3–Mar–2016, Follow-up letter from Senators Cruz, Lankford and Lee to ICANN CEO, at <https://www.icann.org/en/system/files/correspondence/cruz-et-al-to-crocker-03mar16-en.pdf>

<sup>13</sup> 4–Apr–2016, Letter from Senators Cruz, Lankford, and Lee to ICANN, at <https://www.icann.org/en/system/files/correspondence/cruz-lankford-lee-to-crocker-04apr16-en.pdf>

- Last week, on 18–May–2016, Senator Rubio reportedly circulated a letter to NTIA suggesting that some period of delay in the IANA transition was necessary in order to ensure satisfactory implementation of the proposal.<sup>14</sup>
- On 19–May–2016, Senators Cruz, Lankford, and Lee wrote to Commerce Secretary Pritzker and NTIA Assistant Secretary Strickling, giving reasons they believe NTIA should extend the IANA contract:<sup>15</sup>
  1. They believe the proposal “significantly increases the power of foreign governments”
  2. An undefined commitment to respect human rights
  3. The IANA transition might imply a transfer of government property
  4. ICANN may move its headquarters outside the U.S.
  5. The proposal will embolden an unaccountable ICANN board

Below, I address the major points raised by committee members, drawing on my hands-on experience with the ICANN accountability and transition planning process, where I have represented commercial stakeholders since the transition process began in 2014.

#### 5. The accountability enhancements and transition plan address committee concerns

At the same time committee members were raising questions about the transition, the CCWG was also pursuing a structured way to assess how a post-transition ICANN could be held accountable in the face of internal and external threats. The month after NTIA announced the transition, I testified before the House Commerce Committee about *stress tests* to inform and evaluate accountability proposals.<sup>16</sup> I led the working group that applied these stress tests to the accountability proposal, and we ultimately determined that *proposed new accountability measures were a significant improvement over existing measures, and would give the community adequate powers to challenge ICANN’s actions*.

Several stress tests led CCWG to address concerns also raised by committee members, starting with the risks of having ICANN quit the *Affirmation of Commitments* and eliminate its legal presence in the United States, as discussed below.

##### 5.1 ICANN will maintain its legal presence in the United States

Your Feb-2015 hearing touched on *Affirmation of Commitments* section 8b, which commits ICANN to “remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community.” In your Feb-2015 hearing, ICANN CEO Chehadé repeated this commitment, saying, “ICANN shall remain in the United States of America, and we stand by this.”<sup>17</sup>

Many in the CCWG were not content to rely upon a verbal promise made by a CEO, so we sought further assurance of a continued U.S. presence in ICANN’s bylaws and articles of incorporation. We noted this commitment is already part of ICANN bylaws Article XVIII:

“OFFICES. The principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America. ICANN may also have an additional office or offices within or outside the United States of America as it may from time to time establish.”

While ICANN’s board *could* propose a change to this bylaws provision, the empowered community could block the proposed change, using one of its new community powers. In addition, ICANN’s Articles of Incorporation already state that ICANN “is organized under California Nonprofit Public Benefit Corporation Law”<sup>18</sup>.

<sup>14</sup> 18–May–2016, Mario Trujillo in The Hill, “Republicans renew attempts to delay Internet domain handoff”, at <http://thehill.com/policy/technology/280354-republicans-continue-attempts-to-delay-internet-domain-handoff>

<sup>15</sup> 19–May–2016, Letter from Senators Cruz, Lankford, and Lee to Secretary Pritzker and Assistant Secretary Strickling, at <http://www.cruz.senate.gov/files/documents/Letters/20160519-ICANNLetter.pdf>

<sup>16</sup> See Stress Tests, pages 7–10 at *NetChoice Testimony before the House Energy & Commerce Committee, Subcommittee on Communications and Technology—Ensuring the Security, Stability, Resilience, and Freedom of the Global Internet*, 2–Apr–2014

<sup>17</sup> 23–Jun–2015, Roll call vote on HR 805, at <http://clerk.house.gov/evs/2015/roll377.xml>

<sup>18</sup> Section 3 of ICANN Articles of Incorporation, at <https://www.icann.org/resources/pages/governance/articles-en>

The CCWG proposal amends ICANN's Articles of Incorporation such that any change would require a 75 percent majority of the empowered community.

These two foundational documents are sufficient assurance that ICANN will continue to maintain principal offices and a legal presence in the U.S.

*5.2 The post-transition ICANN will **not** see an increase in the power of governments*

Governments have influence on ICANN policy development and contract compliance via their collective participation in the Governmental Advisory Committee (GAC). The GAC was established when the U.S. Commerce Department and American private sector interests first created ICANN in 1998:<sup>19</sup>

The Governmental Advisory Committee should consider and provide advice on the activities of the Corporation as they relate to concerns of governments, particularly matters where there may be an interaction between the Corporation's policies and various laws, and international agreements.

The GAC has gradually grown in its effectiveness to and its advice to ICANN has grown in importance, as seen with policies adopted for the latest expansion of new top-level domains.

In our previous Congressional testimony, I described a stress test where governments could significantly raise their influence via GAC formal advice:<sup>20</sup>

Stress Test #18 is related to a scenario where ICANN's GAC would amend its operating procedures to change from consensus decisions to majority voting for advice to the ICANN Board.

Since the ICANN Board must seek a mutually acceptable solution if it rejects GAC advice, concerns were raised that the Board could be forced to arbitrate among sovereign governments if they were divided in their support for the GAC advice. In addition, if the GAC lowered its decision threshold while also participating in the Empowered Community, some stakeholders believe this could inappropriately increase government influence over ICANN.<sup>21</sup>

Several governments had previously voiced dissatisfaction with the present consensus rule for GAC decisions, so it is plausible that the GAC could change its method of approving advice at some point, such that a majority could prevail over a significant minority of governments. Early on, NTIA said that addressing Stress Test 18 was required for the transition:<sup>22</sup>

As a threshold matter, the USG considers the stress test both appropriate and necessary to meet the requirement that the IANA transition should not yield a government-led or an intergovernmental replacement for NTIA's current stewardship role.

Finally, we interpret the proposed stress test as capturing this important distinction in GAC advice, with an appropriate remedy in the form of a Bylaws amendment to reinforce the ICANN community's expectation that anything less than consensus is not advice that triggers the Bylaw provisions.

In response, the new bylaws would enshrine the GAC's present full-consensus rule as the *only* way to trigger the board's obligation to "try and find a mutually acceptable solution." Several GAC members fiercely resisted this change, saying it interfered with government decision-making and reduced the role of governments. To overcome some of that resistance, we raised the threshold for ICANN's board to reject GAC's full-consensus advice, from today's simple majority (9 votes) to 60 percent (10 votes).

This brings to mind your Feb-2015 hearing, where Senator Fischer asked ICANN CEO Fadi Chehadé about a proposal to raise the rejection threshold to 2/3 of board votes. Chehadé replied, "The Board has looked at that matter and has pushed it back, so it is off the table." It's true that a standalone proposal to raise the GAC rejection threshold was broadly opposed and set aside in late 2014. However, the proposed bylaw to increase the rejection threshold to 60 percent (1 additional vote)

<sup>19</sup> 6–Nov–1998, Bylaws for ICANN, at <https://www.icann.org/resources/unthemed-pages/by-laws-1998-11-06-en>

<sup>20</sup> See Stress Tests 6 & 7, on p. 9 at *NetChoice Testimony before the House Energy & Commerce Committee—Ensuring the Security, Stability, Resilience, and Freedom of the Global Internet*, 2–Apr–2014

<sup>21</sup> pp. 2–3, Annex 11—Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test #18), at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>

<sup>22</sup> E-mail from Suzanne Radell, Senior Policy Advisor, NTIA, 19–Mar–2015, at <http://mm.icann.org/pipermail/accountability-cross-community/2015-March/001711.html>

is an entirely different arrangement, since it reserves the higher threshold *only* for GAC advice adopted “by general agreement in the absence of any formal objection”. This requirement prevents the GAC from generating privileged advice based on anything less than consensus, and more than justifies the addition of 1 more vote to reject that advice.

If the board rejects GAC advice, it must still follow existing bylaws to “try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.” This is an obligation to “try” and does *not* oblige ICANN to find a solution that is acceptable to the GAC.

Another imposition on GAC advice is a requirement that advice “is communicated in a clear and unambiguous written statement, including the rationale for such advice.”<sup>23</sup> And if ICANN’s board accepted GAC advice that is inconsistent with ICANN Bylaws, the community can invoke the independent review process (IRP) to “ensure that ICANN does not exceed the scope of its limited technical Mission and otherwise complies with its Articles of Incorporation and Bylaws.”<sup>24</sup>

As one of the 7 Advisory Committees and Supporting Organizations that comprise the ICANN community, GAC was also invited to participate as a decisional participant of the Empowered Community. A few critics say that we should have excluded GAC from the community, but I cannot imagine that Congress or the Administration would accept an accountability structure where governments—including the U.S.—have no seat at the table. National, state, and local governments maintain websites and services as domain name registrants, and many government employees are Internet users. Moreover, governments have a role among all stakeholders in developing public policy and enforcing laws that are relevant to the Internet.

While GAC is rightfully an equal among ICANN stakeholders, the new bylaws ensure that governments could *not* block a community challenge of ICANN Board’s implementation of GAC advice. In what is known as the “GAC Carve-out”, the bylaws exclude the GAC from the community decision whether to challenge a board action based on GAC consensus advice. Several governments vigorously oppose these bylaws provisions to limit GAC influence and lock-in their consensus method of decision-making. In a statement issued Mar–2016, France’s minister for digital economy complained about ICANN’s new bylaws:<sup>25</sup>

“Despite the continued efforts of civil society and many governments to reach a balanced compromise, elements of this reform project will marginalize states in the decision-making processes of ICANN, especially compared to the role of the private sector.”

Unnamed French foreign ministry officials also told *Le Monde* they were unhappy with the end result, saying: “This is an unsatisfactory condition. The consensus requirement only produces warm water. And that does not put the GAC on the same footing as the other committees of ICANN.”

The French official is right—the GAC is not on the same footing as other ICANN stakeholders. That, however, is by design. Notwithstanding criticism from certain governments, the full package of transition accountability measures sufficiently cabins governmental influence and fully meets NTIA’s conditions for the transition.

### 5.3 The Affirmation of Commitments is being added to ICANN bylaws

The first stress test that we proposed to Congress was where ICANN decides to quit the *Affirmation of Commitments*, a bilateral agreement with the U.S. that either party may terminate with 120 days notice.<sup>26</sup> Once the IANA contract is gone, ICANN could quit the *Affirmation* without fear of losing its control over IANA functions. Even if ICANN wanted to retain the *Affirmation* after transition, that agreement would be targeted for elimination by governments who resent the U.S. having a unique, bilateral relationship with ICANN.

In your Feb–2015 hearing, members of this committee suggested making *Affirmation* obligations permanent. At the same time, the CCWG examined *Affirmation* items to determine which were already in ICANN bylaws, and proposed adding key *Affirmation* commitments to ICANN bylaws—including the 4 periodic community reviews:

<sup>23</sup> 20–Apr–2016, Section 12.3 of Draft New ICANN Bylaws, at <https://www.icann.org/en/system/files/files/proposed-new-bylaws-20apr16-en.pdf>

<sup>24</sup> *Ibid*, Section 4.3 a

<sup>25</sup> 24–Mar–2016, “French scream sacré bleu! as U.S. govt gives up the Internet to ICANN”, at [http://www.theregister.co.uk/2016/03/24/france\\_slams\\_us\\_govt\\_internet\\_transition/](http://www.theregister.co.uk/2016/03/24/france_slams_us_govt_internet_transition/)

<sup>26</sup> See Stress Test 1, on page 8 at *NetChoice Testimony before the House Energy & Commerce Committee, Subcommittee on Communications and Technology—Ensuring the Security, Stability, Resilience, and Freedom of the Global Internet*, 2–Apr–2014

ICANN's accountability & transparency  
 Preserving security, stability and resiliency  
 Promoting competition, consumer trust, and consumer choice  
 The extent to which WHOIS services meet legitimate needs of law enforcement

Now, these reviews will be part of ICANN bylaws, enhanced to give the community access to ICANN internal documents and control over review team composition. In addition, the IANA stewardship group proposed an IANA Functions Review be added to the bylaws.

When combined with new powers to challenge ICANN board decisions, these bylaws changes would enable termination of the *Affirmation of Commitments*. The CCWG concluded that the *Affirmation should* be terminated to avoid having a side agreement different from the new bylaws, and to eliminate a bilateral agreement with the U.S. that would become a target for critics of a unique U.S. Government role in ICANN oversight.<sup>27</sup>

#### 5.4 *The post-transition ICANN would not increase government censorship of online content*

As noted in section 4 above, Senators Cruz, Lankford, and Lee wrote to ICANN's chairman this year about his CEO's engagement with the Chinese government and China's latest regulatory restrictions on domestic Internet domain name registrations. The response from ICANN asserted that the CEO's personal engagement with a Chinese conference was not related to his role as CEO, and said that ICANN's engagement with China "does not suggest any level of support for the Nation's government or its policies."<sup>28</sup>

However, recent moves by the Chinese government to regulate domain name registrations remains troubling to NetChoice members, since it could lead to fragmentation of the global Internet and isolation of China's citizens and businesses. The Senators are right to be concerned about this, and a post this week by NTIA's Larry Strickling and Ambassador Danny Sepulveda echoes those same concerns:<sup>29</sup>

If left unchanged, China's regulations would undermine some of the most fundamental aspects of the Internet—openness, reliability, and interoperability—within China. By creating its own rules for domain name management, China is threatening to fragment the Internet, which would limit the Internet's ability to operate as a global platform for human communication, commerce, and creativity.

However troubling the Chinese government's recent moves may be, they are not an attempt to take control of ICANN or the global domain name system. The Chinese government's move to control domain registrations by Chinese nationals is part of its larger effort to control what reaches or originates from its citizens. It may also be driven by a desire to reduce online fraud and abuse among several hundred million Chinese Internet users, many of whom are going online for the first time.

Fortunately, the Chinese government's censorship regime works only at the *edge* of the Internet, where online traffic enters networks within China's physical borders. Neither China nor other governments can extend censorship to the *core* of the global Internet, so long as our multistakeholder community controls ICANN policy development and holds ICANN accountable for its actions.

Our transition proposal does not help China—or any other government—to extend censorship to the root of the DNS. In fact, we have new powers to challenge board implementation of GAC advice that exceeds our new—and narrower—mission for ICANN. The new bylaws explicitly limit ICANN's ability to impose restrictions on content or conduct:<sup>30</sup>

ICANN shall not regulate (*i.e.*, impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a). For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority.

<sup>27</sup> p. 6, Annex 9—Recommendation #9: Incorporating the Affirmation of Commitments in ICANN's Bylaws, at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>

<sup>28</sup> 6–Apr–2016, Response from ICANN to Senators Cruz, Lee, and Lankford, at <https://www.icann.org/en/system/files/correspondence/crocker-to-cruz-lankford-lee-06apr16-en.pdf>

<sup>29</sup> 16–May–2016, Lawrence Strickling and Daniel Sepulveda, "China's Internet Domain Name Measures and the Digital Economy", at: <https://blogs.state.gov/stories/2016/05/16/china-s-internet-domain-name-measures-and-digital-economy>

<sup>30</sup> 20–Apr–2016, ICANN Draft new Bylaws, at <https://www.icann.org/en/system/files/files/proposed-new-bylaws-20apr16-en.pdf>

Authoritarian regimes don't want the IANA transition to succeed. This transition empowers the private sector, civil society, and technologists—not governments—to take the reins over the global Internet. As one noted China cyber expert put it, this is a development that would dramatically undermine the authoritarians' arguments that only governments can truly manage something as powerful as the Internet.<sup>31</sup> We know this to be false, because of the incredible role that stakeholders from around the world have played for decades in keeping the global Internet safe and running smoothly.

But in the face of these threats to fragment the global Internet, it's more important than ever to ensure that the innovators and entrepreneurs who have always been responsible for growing and protecting the Internet remain at the helm, free from undue government influence. The transition plan we are here to discuss will do precisely that.

*5.5 At this point, a significant delay in this transition could create far more risks than rewards for the interests of U.S. Government, businesses, and citizens*

As noted in section 4, Senators on the committee circulated letters last week indicating reasons to delay the transition beyond the IANA contract expiration on 30-Sep-2016. We acknowledge that a modest delay could give more time to complete remaining implementation tasks and verify promised implementation by the ICANN Board. But an extended delay would create more risks and no significant benefits from the perspective of the U.S. Government, businesses, and citizens.

First, Sen. Rubio wrote that the proposal “would create a radically different governance structure for ICANN”. While it is true that the proposed new governance structure is somewhat complicated, it is rooted in California law to give legal powers to the community. This is the same kind of accountability typically used by shareholders, association members, and voters. Moreover, the newly empowered community would invoke these new accountability powers only if ICANN's board ignored community consensus in its pursuit of a budget, a bylaws change, or a policy action. The mere existence of these new community powers will diminish the board's appetite to confront a united community of disgruntled Internet stakeholders.

Second, Senators raise concern “about the expanded role of governments”. That concern could reasonably arise from looking in isolation at the GAC's status as multi-equal stakeholder in the empowered community. But as noted in section 5.3 above, the net effect of transition changes does not increase the influence of governments over ICANN activities. This is also evident in the complaints of France, Brazil, and other GAC members who believe their influence is being reduced in favor of other ICANN stakeholder groups.

Third, Senators Cruz, Lankford, and Lee worry that the CCWG proposal could commit ICANN to potentially troubling enforcement obligations for human rights. NetChoice shared this concern with the first draft of Bylaws regarding the *Work Stream 2* framework on human rights, so we support this amended Bylaw text:

(viii) Subject to the limitations set forth in Section 27.3, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission, or beyond obligations found in applicable law. *This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against such other parties.*

This proposed bylaws text would make it clear that ICANN will not become embroiled in enforcement of claims related to human rights, and should address the Senators' concern.

Fourth, Sen. Rubio and others observe that there are “details of the proposal that have yet to be developed”, referring specifically to Work Stream 2 elements such as transparency improvements and a new framework for respecting human rights. Actually, there are several additional tasks in Work Stream 2, which will take the CCWG well into mid-2017 to complete.

However, the whole point of separating Work Stream 1 and 2 tasks was to identify what had to be implemented *before* the IANA contract expired, after which there would be very little leverage to force accountability measures that would be resisted by ICANN's board. Work Stream 1 includes new powers to block the board's budget, overturn a board decision, and to recall board directors. Those powers are deemed sufficient to force a future ICANN board to accept Work Stream 2 changes that are developed through community consensus.

<sup>31</sup> Adam Segal, “The Hacked World Order”, (PublicAffairs, 2016) at 220.

In other words, ICANN's new bylaws give the Empowered Community new powers to implement further reforms *at any time*. So the only way to evaluate all changes the community might pursue in the future is to delay the transition *indefinitely*.

A long-term delay of transition would re-ignite the fire at the United Nations, where many governments have cited the U.S. Government role as the sole supervisor of ICANN and the IANA functions as an excuse to gain more control over the Internet for themselves. With this transition we are eliminating the role where one government holds ICANN accountable, by moving to a structure where ICANN is accountable to a broad community of Internet stakeholders. After transition, the U.N. and ITU can no longer point to the U.S. Government role and say they should step into those shoes.

Finally, an extended delay of transition would signal that the U.S. Government does not actually trust the multistakeholder model that we are encouraging China and other governments to trust. China's government would surely note our hypocrisy for criticizing them for failing to embrace domain registration policies developed by ICANN's multistakeholder community.

## 6. Conclusion

This transition is the best opportunity to pursue difficult but necessary reforms to ensure that ICANN is accountable to the community it was created to serve.

It's imperative to empower the Internet community to challenge ICANN decisions on situations that will arise in the decades ahead. The new Bylaws provide direct court enforcement for community's statutory power to remove an individual director or to recall the entire ICANN board.<sup>32</sup> And if the community wins in an independent review process (IRP) and the ICANN board does not comply with the IRP decision, the community can petition a court to enforce the result of the IRP. For all other community powers, the recourse is to recall the entire ICANN board, which is also enforceable *in court*.

The global Internet community has devoted thousands of hours developing this proposal and bylaws, and is facing additional effort on *Work Stream 2* enhancements. We are therefore grateful that this committee approved legislation insisting that NTIA require ICANN to adopt the multistakeholder community proposals *as a condition of the IANA transition*. Your strong support helped us persuade ICANN's board to commit to adopt bylaws changes required by the community proposal—regardless of when this proposal works its way through Washington.

To prepare ICANN for a future independent of U.S. Government contracts, the Internet community needs to hold ICANN accountable, with powers like shareholders have over corporations; voters over their elected officials; and members over their trade associations. This transition can realize the *White Paper* vision for an ICANN that is led by, and accountable to its multistakeholder communities, including the private sector; civil society; and technology experts—along with a limited role for governments. Together, we can bring connectivity, content, and commerce to the next billion global Internet users and to future generations of Americans.

## Annex—United States government stewardship of ICANN and IANA

American engineers came up with a “recipe” for core Internet technologies and promptly gave that recipe to the world. Internet hosts were appearing internationally by the 1980s. The 1990s saw the explosion of commercial uses of the Internet, based on a naming and numbering system also created in the United States. In 1998, the Clinton administration sought to privatize and internationalize the Domain Name System (DNS) with this directive in the *White Paper*:

The President directed the Secretary of Commerce to privatize the Domain Name System in a way that increases competition and facilitates international participation in its management.

The U.S. Government is committed to a transition that will allow the private sector to take leadership for DNS management.<sup>33</sup>

In the 18 years since, it's been a long road from American invention to internationalized private-sector leadership by an entity the U.S. established for the task: the Internet Corporation for Assigned Names and Numbers (ICANN). Three administrations and several Congresses have worked to help ICANN mature and protect

<sup>32</sup> p. 9, Annex 02—Recommendation #2: Empowering the Community through Consensus, at <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>

<sup>33</sup> The “White Paper” on Management of Internet Names and Addresses, U.S. Department of Commerce, Jun–1998, see [http://www.ntia.doc.gov/ntiahome/domainname/6\\_5\\_98dns.htm](http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm)



the vision of private-sector leadership from growing pressure for control by governments, who saw the growth of the Internet and assumed that its governance required an inter-governmental solution.

The transition to an independent ICANN was expected to take a few years, but the National Telecommunications and Information Administration (NTIA) made several extensions of its oversight arrangements, the latest of which expired in September 2009. At the time, NetChoice was among those calling for another extension so that ICANN could develop permanent accountability mechanisms.

Instead, NTIA and ICANN unveiled a new agreement, the *Affirmation of Commitments*.<sup>34</sup> The *Affirmation* established periodic reviews giving all stakeholders—including governments—a defined oversight role in assessing ICANN's performance. The *Affirmation* gave the global Internet community what was promised: independence for ICANN in a framework where governments were alongside private sector stakeholders.

But concerns about the U.S. role in naming and numbering remained after the execution of the *Affirmation*, because NTIA retained its contracting role for the Internet Assigned Numbers Authority (IANA). The IANA contract is deemed essential to ICANN and therefore provided NTIA leverage to hold ICANN to its *Affirmation* obligations.

However, ICANN can quit the *Affirmation* with just 120 days notice. And within a year of signing, ICANN's then-chairman told a group of European parliamentarians that he saw the *Affirmation* as a temporary arrangement ICANN would like to eventually terminate.<sup>35</sup>

All of this to say that ICANN needs a persistent and powerful reminder that it serves at the pleasure of global stakeholders; that ICANN has no permanent lock on managing the Internet's name and address system. We said at the time that ICANN's role in IANA functions should disappear if it were to walk away from the *Affirmation of Commitments*.

Since the U.N. created the Internet Governance Forum (IGF) in 2005, IGF meetings have become increasingly productive, yet some governments still want the U.N. to oversee DNS tasks handled by ICANN and IANA. In its July–2010 statement to the U.N., China's government asked the U.N. and IGF to “solve the issue of unilateral control of the Critical Internet Resources.” By “unilateral control”, China means U.S. custody of the IANA contract. And “Critical Internet Resources” include IP addresses, root servers, and the policymaking for domain names.

China was not alone in its desire for the migration of ICANN and IANA functions to the U.N.'s International Telecommunication Union (ITU). ITU leadership did not like a model where governments share power with industry and civil society, and warned ICANN that sooner or later governments would take greater control of the organization.

In 2011, a group of governments proposed their own replacement for U.S. oversight and ICANN's model of private sector leadership. India, Brazil, and South Africa declared it was time for “establishing a new global body” located “within the U.N. system” to “oversee the bodies responsible for technical and operational functioning of the Internet.”<sup>36</sup> In contrast, both houses of Congress unanimously affirmed a resolution in 2012 stating, “the consistent and unequivocal policy of the United States to promote a global Internet free from government control and preserve and advance the successful multistakeholder model that governs the Internet today.”<sup>37</sup>

The diagram below shows the multiple contractual ties and connections between ICANN and its global stakeholders.

<sup>34</sup> Affirmation of Commitments, 2009, <http://icann.org/en/documents/affirmation-of-commitments-30sep09-en.htm>

<sup>35</sup> Peter Dengate Thrush, in response to a question from Steve DelBianco, at event hosted by European Internet Foundation in Brussels, June 22, 2010.

<sup>36</sup> Recommendations of IBSA Multistakeholder meeting on Global Internet Governance, September 2011, at [http://www.culturalivre.org.br/artigos/IBSA\\_recommendations\\_Internet\\_Governance.pdf](http://www.culturalivre.org.br/artigos/IBSA_recommendations_Internet_Governance.pdf)

<sup>37</sup> H.Con.Res.127 and S.Con.Res.50—Expressing the sense of Congress regarding actions to preserve and advance the multistakeholder governance model under which the Internet has thrived, Aug 20, 2012



Clearly, the last 18 years of “transition” have seen significant improvements in globalizing ICANN and IANA, although there have certainly been some challenges. Along the way, some governments and intergovernmental organizations have criticized the U.S. role and openly coveted taking over that role. But throughout, the U.S. Congress and multiple administrations have stayed with the vision of multi-stakeholder, private-sector leadership for Internet addressing and policymaking. And our government has used its contractual tools to improve ICANN’s performance and to hold the organization to the accountability measures in the *Affirmation of Commitments*.

Still, the U.S. continued to work towards full privatization of ICANN and IANA, at a deliberate pace and with measurable progress. Then came 2013 and Edward Snowden’s revelations of U.S. Government surveillance. While not unique to the U.S. and entirely unrelated to ICANN and the IANA functions, Snowden stoked international concerns that led to the administration’s decision to relinquish the remaining tether of ICANN’s accountability to the U.S.—the IANA functions contract.

#### Ensuring that ICANN accepts and implements the community proposals

In September 2014, all ICANN advisory committees and stakeholder groups wrote a joint letter raising questions about ICANN’s proposed accountability process.<sup>38</sup> ICANN responded by asking whether and why the community seemed to lack trust in ICANN’s board and management. The Business Constituency’s reply is remarkable for its clarity on why the community needs new measures to hold ICANN accountable:<sup>39</sup>

First, this discussion is not about whether the community “trusts” the current ICANN board. It’s about trusting future boards—after we no longer have the leverage/influence of the U.S. Government to rely upon. This IANA transition is the community’s chance to establish mechanisms to rein-in a future board that would put ICANN’s corporate interests ahead of the community. We are not suggesting that a future board would do so. Rather, we are acknowledging

<sup>38</sup> Joint questions, <https://www.icann.org/en/system/files/correspondence/cooper-et-al-to-che-hade-crocker-03sep14-en.pdf>

<sup>39</sup> p. 3, Business Constituency comment on Enhancing ICANN Accountability Process, 27-Sep-2014, at <http://www.bizconst.org/wp-content/uploads/2014/09/BC-comment-on-Enhancing-ICANN-Accountability-Process.pdf>

that the board is obliged to protect the corporation's interests first, as required by ICANN bylaws:

Section 7: Directors shall serve as individuals who have the duty to act in what they reasonably believe are the best interests of ICANN and not as representatives of the entity that selected them.

Should there be any confusion about whether the bylaws refer to "ICANN" as the corporation or the community, see ICANN's *Management Operating Principles* (2008):

"The third and perhaps most critical point of tension is between the accountability to the participating community to perform functions in keeping with the expectations of the community and the corporate and legal responsibilities of the Board to meet its fiduciary obligations. The ultimate legal accountability of the organization lies with the Board, not with the individuals and entities that make up the ICANN community."<sup>40</sup>

The Business Constituency had it right: ICANN's present bylaws do not hold the board accountable to the community. Before the U.S. Government lets go of the oversight leverage inherent in the IANA contract, it must ensure that ICANN accepts and implements the proposals needed to keep the ICANN corporation accountable to the global multistakeholder community that ICANN was created to serve.

The CHAIRMAN. Thank you, Mr. DelBianco.  
Mr. Gross?

**STATEMENT OF HON. DAVID A. GROSS, FORMER  
U.S. COORDINATOR FOR INTERNATIONAL COMMUNICATIONS  
AND INFORMATION POLICY, U.S. STATE DEPARTMENT**

Ambassador GROSS. Thank you very much, Mr. Chairman, members of the Committee. Good morning, and thank you very much for the opportunity to testify before you today.

My name is David Gross. Formerly, I had the great honor of serving the United States in the Department of State as the U.S. Coordinator for International Communications and Information Policy from 2001 until 2009. During that time, I led the United States delegations to the preparatory meetings and was the co-head of the U.S. delegations to both phases of the World Summit on the Information Society, WSIS, that was held by the United Nations in Geneva in 2003 and in Tunis in 2005.

WSIS, among other things, focused on the role of governments regarding Internet governance and resulted in the creation of the Internet Governance Forum, the IGF. Today, I am appearing on behalf of the Internet Governance Coalition, an industry-led coalition with broad representation from the communications, Internet, and related industries.

The Internet Governance Coalition is pleased to testify on the important developments in the process of the transition of key Internet domain name functions to the global multistakeholder community, commenced by NTIA more than 2 years ago. The transition package, including the accountability proposals, created by the global Internet community is an important milestone for the multistakeholder model of Internet governance and for the Internet as a whole.

The progress that has been made regarding these issues is the result of more than 2 years of hard work by many people and organizations, demonstrating that even complex and difficult Internet

<sup>40</sup>ICANN Accountability & Transparency Frameworks and Principles, Jan-2008, p.5, at <https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-10jan08-en.pdf>

related issues can be resolved successfully through bottom-up, community-driven processes. Since the United States has long been the champion of the multistakeholder process for resolving Internet governance related issues, this success is very good news for America.

Our review of the IANA Stewardship Transition Plan is rooted in the principles laid out by NTIA at the commencement of this process in March 2014. Recognizing that the U.S. Government must still make its careful assessment of the proposals and their implementation, and recognizing that there are constructive suggestions for further improvements that were recently made, we believe that the process set forth by NTIA and the transition itself will ensure the ongoing stability and reliability of the Internet.

Importantly, we are encouraged that, to date, the multistakeholder process has worked well and has enabled companies, technologists, members of the civil society, and users to be heard loud and clear. Importantly, this success should be viewed as illustrating the benefits of the policies associated with the elimination of unnecessary governmental involvement in the operation of the technical aspects of the Internet.

Of course, the completion of the IANA stewardship transition will not be the end of the road. But the question is not whether the challenges will emerge. It is whether the multistakeholder community is robust and resilient enough to deal with those challenges and to help shape Internet policies worldwide. Simply put, it is. So the companies represented by the Internet Governance Coalition not only will stay engaged with the implementation of the IANA transition but also will remain vigilant in monitoring and participating in Internet governance discussions as they arise in other fora, as they most certainly will.

Thank you very much, and I look forward to answering your questions.

[The prepared statement of Ambassador Gross follows:]

PREPARED STATEMENT OF AMBASSADOR DAVID A. GROSS, FORMER COORDINATOR FOR INTERNATIONAL COMMUNICATIONS AND INFORMATION POLICY, U.S. DEPARTMENT OF STATE

#### **Summary**

The Internet Governance Coalition is pleased to testify on the important developments in the process to transition key Internet domain name functions to the global multistakeholder community, commenced by NTIA more than two years ago. The transition package, including the accountability proposals, created by the global Internet community is an important milestone for the multistakeholder model of Internet governance and for the Internet as a whole. The progress that has been made regarding these issues is the result of more than two years of hard work by many people and organizations, demonstrating that even complex and difficult Internet-related issues can be resolved successfully through bottom-up, community-driven processes. Since the United States has long been the champion of the multistakeholder process for resolving Internet governance-related issues, this success is very good news for America.

Our review of the IANA Stewardship Transition Plan is rooted in the principles laid out by NTIA at the commencement of this process in March 2014. Recognizing that the U.S. Government still must make its careful assessment of the proposals and their implementation, and recognizing there are constructive suggestions for further improvements, we believe that the process set forth by NTIA, and the transition itself, will ensure the ongoing stability and reliability of the Internet. Importantly, we are encouraged that to date the multistakeholder process has worked well and has enabled the companies, technologists, members of civil society, and users

to be heard loud and clear. This success should be viewed as illustrating the benefits of policies associated with the elimination of unnecessary government involvement in the operation of the technical aspects of the Internet.

Of course, the potential completion of the IANA Stewardship Transition will not be the end of the road. But the question is not whether challenges will emerge; it is whether the multistakeholder community is robust and resilient enough to deal with those challenges and to help shape Internet policies worldwide. Simply put, it is. So the companies represented by the Internet Governance Coalition not only will stay engaged with the implementation of the IANA transition, but also will remain vigilant in monitoring and participating in Internet governance discussions as they arise in other fora.

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Chairman, Ranking Member, Members of the Committee, good morning and thank you for the opportunity to testify before you today.

My name is David A. Gross. Formerly, I had the great honor of serving in the Department of State as the United States Coordinator for International Communications and Information Policy from 2001 to 2009. During this time, I led the United States delegations to the preparatory meetings and I was the co-head of the United States delegations to both phases of the United Nations' World Summit on the Information Society (WSIS) in Geneva (2003) and Tunis (2005), which, among other things, focused on the role of governments regarding Internet governance and resulted in the creation of the Internet Governance Forum (IGF). Today I am appearing on behalf of the Internet Governance Coalition, an industry-led coalition with broad representation from the communications, Internet, and related industries, including AT&T, Inc., Cisco Systems, Inc., Comcast NBCUniversal, Facebook, GoDaddy, Google Inc., Juniper Networks Inc., Microsoft Corporation, Telefónica, S.A., The Walt Disney Company, Time Warner Cable Inc., Twenty-First Century Fox Inc., and Verizon Communications Inc.

I am pleased to appear before this Committee to testify regarding the important developments in the process of transitioning key Internet domain name functions to the global multistakeholder community. The National Telecommunications and Information Administration's (NTIA) decision to initiate a process leading to the possible transition of the Internet Assigned Numbers Authority (IANA) functions contract to a multistakeholder entity is a critical step toward bringing the economic and societal benefits of the Internet to everyone.

The ICANN Board has taken several important steps to implement the transition, including approving a plan for transitioning control of the IANA functions to the multistakeholder community, and related accountability proposals. That transition package was forwarded to NTIA for review. Last month, the Board also issued draft amended bylaws designed to implement the recommendations in the transition package. The ICANN Board accepted public comments on the draft amended bylaws from April 21 to May 21, which prompted some constructive suggestions for ensuring the bylaws appropriately adhere to the recommendations of the IANA Stewardship Transition Plan. Should the ICANN Board vote to adopt revised bylaws, NTIA will have the entire transition package and be in a position to conclude its assessment. If the transition package is adopted and approved, it will be because of the more than two years of hard work performed by diverse people and organizations, demonstrating that even complex and difficult Internet-related issues can be resolved successfully through a multistakeholder process.

The Coalition believes that a thriving Internet depends on a governance structure that is open, transparent, and representative of all stakeholders. The current multistakeholder model for Internet governance facilitated the historic Internet-driven economic, social, and political development of the past two decades. The decentralized structure of the Internet enabled individuals to access information and services, to connect and to communicate, and to share ideas and knowledge globally. By offering new possibilities for entrepreneurial creativity, the Internet became a powerful engine for unparalleled technological innovation, economic growth and the preservation and promotion of cultural diversity.

Too much government oversight, however, potentially can place these important benefits in jeopardy by hampering innovation and technological development and threatening Internet growth. United States Government oversight of the IANA functions has been a long-standing concern of many in the global community. Yet, in carefully transitioning the IANA functions to a bottom-up multistakeholder entity, the United States is addressing these concerns while simultaneously promoting its core values by affirming our Nation's commitment to the multistakeholder model. Those core values have, at their heart, the strong belief that no other government or intergovernmental entity should be able to control ICANN. Indeed, the U.S. Gov-

ernment's role vis-à-vis ICANN has always belied the reality that companies, technologists, members of civil society, and users—not governments in general, nor the U.S. Government in particular—have been primarily responsible for ensuring that the Internet's technical functions continue to drive economic and social opportunities around the world. The IANA Transition ensures that this reality is now reflected in the bylaws and procedures governing ICANN. Done properly, the IANA Transition should help to unleash the private sector and others toward greater innovation and improved Internet connectivity and services, all without unnecessary government involvement.

After the transition, the United States is expected to continue to participate actively in the Government Advisory Committee (GAC), one of the important stakeholder constituencies in the multistakeholder model. Accordingly, after the IANA Transition, U.S. interests will continue to be well-represented—an outcome that is good for America and good for the global Internet community.

By ensuring that the principles NTIA identified for the transition are met—which are critical conditions for this process to work successfully—the United States will succeed in creating an environment to maintain the freedom, openness, security, and stability of the Internet we have all enjoyed since its inception. Of course, robust accountability and transparency mechanisms are necessary to ensure future stability in the absence of NTIA's current role, and these additional mechanisms, contained in the new accountability proposal approved by the ICANN Board, must be in place prior to or simultaneous with the transition.

As this Committee knows from prior testimony, the Coalition supported NTIA's assurance that an acceptable transitional proposal must:

- Support and enhance the multistakeholder model;
- Maintain the security, stability, and resiliency of the Internet DNS;
- Meet the needs and expectation of the global customers and partners of the IANA services; and,
- Maintain the openness of the Internet.

These principles, together with NTIA's critically important, explicit commitment not to accept any plan that could replace its role with a government-led or an inter-governmental organization, are consistent with the Coalition's own policy principles, which also have been the basis of its advocacy before the United Nations, the International Telecommunication Union (ITU), and elsewhere.

The importance of the Internet to U.S. and global businesses, and its social and cultural centrality to people around the world, cannot be overstated. Accordingly, we need to preserve the stability and reliability of the Internet, in terms of both technical decision making and policy making. Changes in the processes of Internet governance—which have helped shape the historic growth of the Internet economy, and the immense benefits that it has brought—are of great interest and concern to the Internet Governance Coalition. That is why, although the Coalition itself has not been directly involved in the process of developing the stewardship transition plan and accountability proposals, some Coalition member companies have taken an active role and the Coalition has monitored the processes and has been diligent in its review of the outcomes.

In these various fora, the Internet Governance Coalition has stressed that we all—governments, the private sector, civil society, technologists, users, and others—must join together to ensure a safe, secure, open, interoperable, and global Internet as the underlying foundation for sustainable economic and social development. This means promoting policies that stimulate continued investment in, deployment of, and access to Internet networks and the industries and services that create demand for those networks. It also means continuing to support capacity building and assistance on implementation of network security best practices, especially in the developing world.

Policies must support opening and maintaining international markets allowing the seamless flow of legal digital services, applications, products and information. Any actions taken should foster innovation and investment across Internet networks, services, and other sectors of the Internet ecosystem. This includes ensuring both the enhancement of human rights and the protection of intellectual property. Governments can advance these goals by establishing even-handedness and predictability in decision-making, while at the same time encouraging reduced direct Internet oversight and control.

Finally, the Internet Governance Coalition believes in increased and appropriate transparency and openness in intergovernmental organizations and multistakeholder mechanisms, to ensure that all stakeholders can participate meaningfully in

key Internet policy discussions. The quality of Internet governance decisions increases when diverse stakeholders actively and consistently participate. Furthermore, this approach is consistent with America's long-standing policy of unlocking innovation by freeing sectors from unnecessary government oversight.

Recognizing, of course, that the U.S. Government still must complete its careful assessment of the proposals, and recognizing that there already are constructive suggestions for further improvements, we are optimistic that the results of ICANN's and NTIA's remaining work will result in a transition that will meet NTIA's conditions set forth two years ago and that should benefit not only global businesses but also all those who seek a more global and ubiquitous Internet. In addition, although the U.S. Government's review of the transition proposal justifiably may take time, the Coalition believes these new accountability mechanisms should be put into place promptly regardless of the timing of the overall transition. These mechanisms, a product of the two-year-long multistakeholder process, should help to ensure the ongoing stability and reliability of the Internet as it continues to help the world's people economically, socially and culturally.

Ultimately, the Internet Governance Coalition believes the proposals approved by the ICANN Board in Marrakesh will be good for America, good for American business, good for the Internet, and good for the world. The members of the Internet Governance Coalition believe that it is critically important that the free and open Internet is protected and that ICANN is accountable to the Internet community. Therefore, it is important that any final plan approved by NTIA do these things. Looking ahead, all stakeholders should stay engaged, especially in the near term as ICANN works to adopt amended bylaws and the U.S. Government undertakes its review. Continuing improvements to these processes can be made, including with respect to increasing transparency into ICANN's functions and interactions. Such work begins in earnest next month and ongoing engagement by U.S. businesses and the U.S. Government with ICANN as it matures into "adulthood" is essential.

I would like to thank the Committee for allowing me, on behalf of the Internet Governance Coalition, to present our views on these matters of great importance for preserving the fundamental principles that have governed the Internet, and have greatly benefited not only America, but also the world.

The CHAIRMAN. Thank you, Ambassador Gross.  
Mr. Manning?

**STATEMENT OF RICHARD MANNING, PRESIDENT,  
AMERICANS FOR LIMITED GOVERNMENT**

Mr. MANNING. Chairman, Ranking Member, and distinguished members of the Committee, thank you for the opportunity to offer Americans for Limited Government's view regarding the NTIA plan to transition oversight of the Internet's Domain Name System.

Advocates of the transition have long held the concern that failure to move forward would in some way fracture the Internet, and that has been the rationale given by many for the U.S. to proceed with turning over the IANA functions to a new governance body led by the current vendor, ICANN, which handles these and other functions on behalf of the U.S. Government.

Last year, then outgoing ICANN CEO and President Fadi Chehadé stated that failure to transition the IANA functions would result in this fracturing, saying, "ICANN's community may fracture or fray slowly, becoming divided. The technical operating communities using IANA may go separate ways."

But that's not the real danger. Let me be clear. No multistakeholder system that can be devised, even with all these smart guys sitting at this table—no multistakeholder system can be devised that will ever be as effective at protecting the free and open Internet as the current U.S. Government and the protections of the U.S. Constitution. In short, the Internet works, so the burden of proof on whether to change control over some of the core functions is on

the proponents of that change, and the fracturing rationale for change is already becoming moot.

Last week, the State Department's Daniel Sepulveda and NTIA's Lawrence Strickling stated in an official blog post that the Internet is already being fractured by China, which has developed an alternate root zone system as well as a separate naming convention. Sepulveda and Strickling write, "If left unchanged, China's regulations would undermine some of the most fundamental aspects of the Internet—openness, reliability, and interoperability—within China. By creating its own rules for domain name management, China is threatening to fragment the Internet, which would limit the Internet's ability to operate as a global platform for human communication, commerce, and creativity."

Only the most naïve would believe that going forward with this transition will assuage the government of China from implementing their own Internet censorship regime. One only needs to look at the recorded failed attempt to have 12,000 different words excluded from use in domain names on the dot-xyz top level domain for proof that the Chinese will pursue their own vision for the Internet for the future.

So how would ICANN hold up over the long haul in protecting a free and open Internet? I must contend not well, based upon a proposal to change ICANN's bylaws that is pending right now to include a commitment to respect, "international recognized human rights."

A May 20 letter by Senators Cruz, Lee, and Lankford to Commerce Secretary Pritzker explains that this provision would "open the door to the regulation of content. Inclusion of such a commitment would unquestionably be outside the historical mission of an organization whose functions are supposedly very limited to the names and numbers and protocol parameters which are way down in the plumbing of the Internet."

Cruz, Lee, and Lankford continued, "However, any provision such as human rights that is included in ICANN's bylaws automatically becomes an integral part of ICANN's core mission and, in this case, could provide a gateway to content regulation." Regulating content is antithetical to the concept of a free and open Internet, and ICANN's willingness to even consider this proposal shows a stunning admission of their inadequacy to be the protector of speech in a post-transition world.

As this committee is well aware from the recent Facebook censorship allegations, a private entity has no legal responsibility to uphold First Amendment freedoms, and, post-transition, this would apply to ICANN, and any Constitutional protection afforded to holders of domains against censorship would be washed away. It is also increasingly clear that any attempt to transition the Internet will face significant legal hurdles, disrupting any orderly transition.

The first legal issue is whether President Obama has the authority to conduct the transfer without going through the congressionally established channels for the disposal of property. The administration has argued that they would not be transferring property so the law doesn't apply. Yet the contracts that govern the relationship between the U.S. Government and ICANN repeatedly refer to



it as property, negating their argument and making their process for the transition dubious at best.

Adding to the legal questions, ICANN is currently exempt from any antitrust litigation over their highly lucrative monopoly in creating and selling top level domain names. This protection is due to the very government vendor contract they seek to get out from under. Not that it should, but Congress has not acted to provide ICANN any post-transfer antitrust exemptions. As a result, it's reasonable to assume that legal challenges would be forthcoming with potential competitors attempting to break ICANN's single source power to price current and future top level domain names, manage existing top level domain leases, and create new top level domain names.

As strange as it may seem, the same Obama administration that seeks to transition the people of the United States' property to ICANN was so frustrated by this vendor just 4 years ago, they put out an RFP on the contract due to ICANN's accountability failures. Yet today, they ask you to give some new untested iteration of that same unresponsive vendor permanent power with little accountability to you, as representatives of the people of the United States.

The U.S. Government stands as the protector of freedom on the Internet. Vendors like ICANN help bring specific expertise to manage the day to day operations of the Internet, and the system functions well when the U.S. Government plays its oversight role to prevent abuse. Americans for Limited Government urges you to use every legislative power at your disposal to stop the planned transition of these critical Internet functions to ICANN. The rationale for the transition is moot, and allowing the Obama administration to proceed would create an open door to future Internet censorship.

I submit the remainder of my testimony for the record.

[The prepared statement of Mr. Manning follows:]

PREPARED STATEMENT OF RICHARD MANNING, PRESIDENT,  
AMERICANS FOR LIMITED GOVERNMENT

Chairman Thune, Ranking Member Nelson, and members of this distinguished committee, thank you for the opportunity to offer Americans for Limited Government's views regarding the National Telecommunications and Information Administration's (NTIA) plan to transition oversight of the Internet's domain name system (DNS), including the Internet Assigned Numbers Authority (IANA) functions, to the Internet Corporation for Assigned Names and Numbers (ICANN).

The actions of Congress over the months ahead will determine if the primary value of maintaining a free and open Internet prevails or not.

Advocates for the transition have long held the concern that failure to move forward would in some way fracture the Internet, and that has been the rationale given for the U.S. to proceed with turning over the IANA functions to a new governance body led by the current vendor, ICANN, which handles these and other functions on behalf of the U.S. Government. Last year, then-outgoing ICANN CEO Fadi Chehadé stated that failure to transition the IANA functions would result in fracturing. Chehadé stated, "ICANN's community may fracture or fray slowly, becoming divided. . . . The technical operating communities using IANA may go separate ways . . ." <sup>1</sup>

But that is not the real danger. Let me be clear, no multistakeholder system that can be devised will ever be as effective at protecting a free and open Internet as the current United States government oversight system.

It is probably safe to assume that everyone in this room agrees that protecting a free and open Internet is a primary value. It is also probably safe to assume that everyone agrees that the Internet structure as currently administered by the United

<sup>1</sup> <http://domainincite.com/19390-chehade-outlines-five-ways-icann-could-die>

States government has provided that platform since its inception. In short, the Internet works, so the burden of proof on changing management over some of its core functions is on the proponents.

What is also undeniably true, based upon a State Department hosted May 16, 2016, blog post<sup>2</sup> by Daniel Sepulveda,<sup>3</sup> the Deputy Assistant Secretary of State and U.S. Coordinator for International Communications and Information Policy in the State Department's Bureau of Economic and Business Affairs (EB)<sup>4</sup> and Lawrence E. Strickling, the Assistant Secretary of Commerce for Communications and Information and Administrator, National Telecommunications and Information Administration, is that the Internet is already being fractured by China which has developed an alternate root zone system as well as a separate naming convention.

Sepulveda and Strickling write, "The digital economy has become one of the most powerful engines for global economic growth. If left unchanged, China's regulations would undermine some of the most fundamental aspects of the Internet—openness, reliability, and interoperability 1—within China. By creating its own rules for domain name management, China is threatening to fragment the Internet, which would limit the Internet's ability to operate as a global platform for human communication, commerce, and creativity."

Only the most naïve would believe that the government of China is going to be assuaged to not implement their own Internet censorship regime if only the United States turned a large portion of Internet governance over to a multi-national stakeholder community.

And those who believe that the IANA functions transition would temporarily stem China's threat to fracture the Internet, need only look at China's attempted censorship demands on the .XYZ top level domain name where the government of China demanded last year that the owner not allow 12,000 different words be accepted as domain names including "liberty" and "democracy" as revealing the terrible potential cost of maintaining the Internet's "interoperability."

Stunningly, the issue of possible content censorship in a post-transition world is left wide open by a proposal to insert into ICANN's bylaws a commitment to respect "internationally recognized human rights." A May 20, 2016, letter by Senators Cruz, Lee and Lankford to Commerce Secretary Pritzker states this provision "would open the door to the regulation of content. Inclusion of such a commitment would unquestionably be outside the historical mission of an organization whose functions are supposedly 'very limited to the names and numbers and protocol parameters which are way down in the plumbing of the Internet.'"<sup>5</sup>

Cruz, Lee and Lankford continue writing, "However any provision, such as human rights, that is included in ICANN's bylaws automatically becomes an integral part of ICANN's core mission and, in this case, could provide a gateway to content regulation."

Given the audacity of ICANN's proposal before the transition has even occurred, Congress can be assured that if content is not regulated, then China or somebody else could aggressively fracture the Internet as the free exchange of ideas is antithetical to their national interest. And if content is regulated, the Internet will cease to exist as a free and open system removing its DNA and unalterably changing it. What's more, as this committee is well aware from the recent Facebook censorship allegations, a private entity has no legal responsibility to uphold First Amendment freedoms, so post-transition, there would be no constitutional protection afforded holders of domains using terms like liberty, should China or any other entity prevail in a censorship gambit.

What's more it is increasingly clear that any attempt to transition the Internet will face significant legal hurdles disrupting any orderly transfer.

The first legal issue surrounds whether President Obama has the authority to conduct the transfer without going through the Congressionally established legal channels for the disposal of property. The Administration has argued that they would not be transferring property so the law doesn't apply, yet, the contracts that govern the relationship between the U.S. Government and ICANN repeatedly refer to property negating that argument.

Incredibly, the same Obama Administration that seeks to deny that ICANN manages U.S. Government property, put out a Request for Proposals in 2012 for the contract that ICANN manages due to the vendor's failure to respond to various accountability changes that were being demanded. Yet, today, they ask you to give

<sup>2</sup> <https://blogs.state.gov/stories/2016/05/16/china-s-internet-domain-name-measures-and-digital-economy#sthash.m76i03qf.dpuf>

<sup>3</sup> <http://www.state.gov/r/pa/ei/biog/bureau/209063.htm>

<sup>4</sup> <http://www.state.gov/e/eb/>

<sup>5</sup> [http://www.cruz.senate.gov/?p=press\\_release&id=2646](http://www.cruz.senate.gov/?p=press_release&id=2646)

some iteration of that same unresponsive vendor permanent power with little if any accountability to either the U.S. Government or you as representatives of the people of the United States.

What's more, ICANN has been exempt from any antitrust questions of their highly lucrative monopoly in creating and selling top level domain names due to their being protected by the very contract they seek to get out from under. Congress has not acted to provide ICANN any antitrust exemptions should the transfer occur. Not that it should, but as a result, it is reasonable to assume that legal challenges would be forthcoming should the transfer occur attempting to break ICANN's single source power to price current and future top level domain names, manage existing top level domain leases and create new top level domain names.

The United States government stands as the protector of freedom on the Internet. Vendors like ICANN help bring specific expertise to manage the day to day operations of the Internet, and the system functions well when the United States government plays its oversight role to prevent abuse.

Absent the U.S. Government's light handed oversight, the idea of a free and open Internet will certainly become a thing of the past.

I urge you to use every legislative power at your disposal to stop the planned transition of these critical Internet functions to ICANN. The rationale for the transition is moot and allowing the Obama Administration to proceed would create an open door to future censorship. I submit the remainder of my testimony for the record. Yet I must remind you to consider if you choose to proceed not only how the NTIA transition plan might work, but what could happen to the free and open Internet if it does not.

#### **Does the NTIA have legal authority to transfer IANA functions to ICANN?**

On March 25, 2014, Rep. Blake Farenthold and Rep. Darrell Issa issued a letter<sup>6</sup> to Assistant Secretary for Communications of the National Telecommunications and Information Administration (NTIA) Lawrence Strickling regarding the NTIA's March 14, 2014, announcement<sup>7</sup> of its intention to transition key Internet domain name functions to the Internet Corporation for Assigned Names and Numbers (ICANN) and the global multistakeholder community. The letter specifically asked Strickling, "Does the Executive Branch have unilateral authority to transfer control over the Internet addresses and root zone management of domains?"

On Jan. 14, 2015, Issa and Farenthold actually received a reply from Strickling on April 28, 2014.<sup>8</sup> In it, Strickling stated: "NTIA's announcement marks the final phase of privatization of the Internet domain name system (DNS) first outlined by the U.S. Government in 1998 after broad consultation with stakeholders in the development of Statement of Policy," referring to *Federal Register* Volume 63, Number 111 published on Wednesday, June 10, 1998, Pages 31741-31751.<sup>9</sup>

Strickling added, "Our action is fully consistent with the 2012 resolution, H.Con.Res.127, that called on the United States to continue to support a global Internet free from government control and to preserve and advance the successful multistakeholder model that governs the Internet."

On the specific question of legal authority, Strickling wrote: "In 2000, NTIA did not contract with ICANN to procure the IANA functions services as an assertion of 'control' over the Internet DNS. Rather NTIA contracted with ICANN as a temporary measure to carry out the government's policy to allow the private sector to take leadership for management of the Internet DNS. By performing the IANA functions in a competent manner for almost a decade and half, ICANN has established itself in this role and there is no longer a need to maintain a government contract designating it to perform these functions. Just as Federal agencies can enter into contracts they need to fulfill their missions without specific legislative authority, Federal agencies can discontinue obtaining services when they no longer need them. As NTIA made clear at the time of its Statement of Policy, it intended only to procure the IANA functions services until such time as the transition to private sector management of the Internet DNS was complete."

Finally, in a footnote Strickling stated referencing a 2000 then-General Accounting Office (GAO) report on the potential need for legislative action in this area: "GAO's discussion about the need for legislative authority to transfer government

<sup>6</sup><http://farenthold.house.gov/uploadedfiles/icann.pdf>

<sup>7</sup><http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>

<sup>8</sup>[http://getliberty.org/wp-content/uploads/2015/01/NTIA\\_Letter\\_to\\_Rep\\_Issa\\_4-28-14.pdf](http://getliberty.org/wp-content/uploads/2015/01/NTIA_Letter_to_Rep_Issa_4-28-14.pdf)

<sup>9</sup><http://www.gpo.gov/fdsys/pkg/FR-1998-06-10/html/98-15392.htm>

property does not concern the provision of the IANA functions under contract since no government property or assets are involved in the contract.”<sup>10</sup>

**The IANA functions contract, government property and Article IV, Section 3 of the Constitution**

Although Strickling claimed in the letter that “no government property or assets are involved in the contract,” here, Strickling clearly mischaracterized the contract. To wit, the current October 1, 2012, NTIA contract with ICANN explicitly states that “All deliverables under this contract become the property of the U.S. Government.”<sup>11</sup>

Deliverables under the contract include “technical requirements for each corresponding IANA function,” “performance standards in collaboration with all interested and affected parties . . . for each of the IANA functions,” and “a fully automated root zone management system . . . [that] must, at a minimum, include a secure (encrypted) system for customer communications; an automated provisioning protocol allowing customers to manage their interactions with the root zone management system; an online database of change requests and subsequent actions whereby each customer can see a record of their historic requests and maintain visibility into the progress of their current requests; and a test system, which customers can use to meet the technical requirements for a change request; an internal interface for secure communications between the IANA Functions Operator; the Administrator, and the Root Zone Maintainer,” among other items.

Further, ICANN collects annual revenues of more than \$100 million a year, making it property of real value.

Article 4, Section 3 of the U.S. Constitution states that only “The Congress shall have power to dispose of . . . property belonging to the United States.”

It therefore follows that NTIA cannot perform the transfer of the IANA functions to ICANN without a vote in Congress, or some other authorizing statute, for example, 40 U.S.C., Chapter 5, Subchapter III, “Disposing of property” (see below).

In addition, the IANA itself reverts to the Commerce Department upon termination of the contract: “the Government may terminate the contract for default.” The contract even provides for the possibility of IANA being performed by another entity: “In the event the Government selects a successor contractor, the Contractor shall have a plan in place for transitioning each of the IANA functions to ensure an orderly transition while maintaining continuity and security of operations.” These provisions further indicate that upon conclusion of the contract on Sept. 30, 2015, the Commerce Department remains in possession of the IANA functions.

**Disposal of property provided under 40 U.S. Code, Chapter 5, Subchapter III**

In Strickling’s letter to Rep. Issa, he explicitly denied that there was any property or assets involved in the transfer of the IANA functions to ICANN: “the need for legislative authority to transfer government property does not concern the provision of the IANA functions under contract since no government property or assets are involved in the contract.” This despite the fact the contract, explicitly states, “All deliverables under this contract become the property of the U.S. Government.”

One reason to deny this might be because, if it were government property, then it would fall under an onerous process for disposing of property under the 40 U.S.C., Chapter 5, Subchapter III, “Disposing of property.” The disadvantage to NTIA and ICANN would be that the IANA functions would have to come up for competitive bid as provided in 40 U.S.C. 545 (a).

Or if a negotiated sale as provided in 40 U.S.C. 545 (d)(1), it would have to done at “fair market value”: “the sale must be publicized to an extent consistent with the value and nature of the property involved and the price established must reflect the estimated fair market value of the property.” Since this is an entity that does more than \$100 million a year of revenue, the fair market value of the IANA functions—we’re talking about a global monopoly for allocation of an unlimited number of IP addresses, domain names, and top-level domain names—it *should be worth billions!*

Or, if disposal through a contract broker as provided in 40 U.S.C. 545 (c), “wide public notice of the availability of the property for disposal” would be required: “Disposals and contracts for disposal of surplus real and related personal property through contract realty brokers employed by the Administrator shall be made in the manner followed in similar commercial transactions under regulations the Adminis-

<sup>10</sup><http://www.gao.gov/new.items/og00033r.pdf>

<sup>11</sup>[http://www.ntia.doc.gov/files/ntia/publications/sf\\_26\\_pg\\_1-2-final\\_award\\_and\\_sacs.pdf](http://www.ntia.doc.gov/files/ntia/publications/sf_26_pg_1-2-final_award_and_sacs.pdf)

trator prescribes. The regulations must require that brokers give wide public notice of the availability of the property for disposal.” Yet, no such notice has been given.

#### **The Antitrust Implications under 40 U.S.C. 559 (b)(1)**

But perhaps most critically, if Strickling were to acknowledge there is property at stake, the disposal of such property to a private interest would invoke antitrust.

40 U.S.C. 559 (b)(1) states: “An executive agency shall not dispose of property to a private interest until the agency has received the advice of the Attorney General on whether the disposal to a private interest would tend to create or maintain a situation inconsistent with antitrust law.” Since Strickling’s position is that there is no property involved, NTIA would not have sought the Attorney General’s advice the disposal of property to a private interest prior to the March 2014 announcement.

That is a huge liability for ICANN, and potentially for anyone involved at the agency if the provision of the contract stating “All deliverables under this contract become the property of the U.S. Government” was deliberately ignored. No more so than because 15 U.S.C. Section 2 prohibits and makes a felony any attempt “to monopolize any part of the trade or commerce among the several states, or with foreign nations.” 15 U.S.C. Sections 13 and 14 forbid any business practice where the effect “may be to substantially lessen competition or tend to create a monopoly in any line of commerce.”

Antitrust law challenges to IANA functions administrator were anticipated in the 1998 statement of policy: “Several commenters suggested that the U.S. Government should provide full antitrust immunity or indemnification for the new corporation. Others noted that potential antitrust liability would provide an important safeguard against institutional inflexibility and abuses of power.”

To which, NTIA responded, saying it would seek no such immunity for the corporation and that antitrust would actually help keep the corporation in line: “Applicable antitrust law will provide accountability to and protection for the international Internet community. Legal challenges and lawsuits can be expected within the normal course of business for any enterprise and the new corporation should anticipate this reality.”<sup>12</sup> Is that not still a danger today?

Did NTIA even conduct any legal analysis about whether it had the authority to proceed with the transfer?

In an April 2, 2014, letter to Assistant Secretary of Commerce Lawrence Strickling, head of the National Telecommunications and Information Administration (NTIA), 35 Senate Republicans including Sen. John Thune (R-S.D.) and Sen. Marco Rubio (R-Fla.) sought “clarification regarding the recent announcement that NTIA intends to relinquish responsibility of the Internet Assigned Numbers Authority (IANA) functions to the global multistakeholder community.”<sup>13</sup>

In part, the letter questions the legal basis for the Commerce Department to perform the transition of vital Internet names and numbers functions, citing a 2000 report by the then-U.S. General Accounting Office, which stated, “it is unclear if the Department has the requisite authority” to transfer control of the IANA functions to a private entity. The Senate letter requests “the Administration’s legal views and analysis on whether the United States Government can transition the IANA functions to another entity without an Act of Congress.”<sup>14</sup>

Yet, to date, the White House has failed to produce the legal basis for transferring the IANA functions without Congress, despite numerous requests. As revealed on March 23, 2014, by the *Wall Street Journal’s* L. Gordon Crovitz: “a spokesman for the Commerce Department’s National Telecommunications and Information Admin-

<sup>12</sup> “Applicable antitrust law will provide accountability to and protection for the international Internet community. Legal challenges and lawsuits can be expected within the normal course of business for any enterprise and the new corporation should anticipate this reality. The Green Paper envisioned the new corporation as operating on principles similar to those of a standard-setting body. Under this model, due process requirements and other appropriate processes that ensure transparency, equity and fair play in the development of policies or practices would need to be included in the new corporation’s originating documents. For example, the new corporation’s activities would need to be open to all persons who are directly affected by the entity, with no undue financial barriers to participation or unreasonable restrictions on participation based on technical or other such requirements. Entities and individuals would need to be able to participate by expressing a position and its basis, having that position considered, and appealing if adversely affected. Further, the decision making process would need to reflect a balance of interests and should not be dominated by any single interest category. If the new corporation behaves this way, it should be less vulnerable to antitrust challenges.” *Federal Register* Volume 63, Number 111 published on Wednesday, June 10, 1998, Pages 31741–31751, <http://www.gpo.gov/fdsys/pkg/FR-1998-06-10/html/98-15392.htm>

<sup>13</sup> <http://www.thune.senate.gov/public/index.cfm/2014/4/thune-rubio-demand-answers-from-administration-on-internet-transition>

<sup>14</sup> <http://www.gao.gov/new.items/og00033r.pdf>

istration said the agency reviewed this legal issue and concluded the administration can act without Congress but refused to share a copy of the legal analysis.”<sup>15</sup>

The Crovitz report prompted Americans for Limited Government to file a Freedom of Information Act (FOIA) request with the NTIA requesting the legal basis for its plans to transition control over Internet governance to some as of yet unnamed international body. The FOIA request includes “All records relating to legal and policy analysis developed by or provided to the National Telecommunications and Information Administration that support its decision to ‘transition key Internet domain name functions,’ including any analysis showing whether the NTIA has the legal authority to perform the transition.”<sup>16</sup>

The Department’s interim response to the FOIA request,<sup>17</sup> which was referenced in the *Wall Street Journal* on June 29, 2014, by Crovitz,<sup>18</sup> still failed to produce the legal analysis. And the agency’s many responses since<sup>19 20 21 22</sup> have not produced any legal analysis supporting the transition, nor has the agency claimed any privileged exemptions under the FOIA Act. Meaning, such an analysis being conducted prior to the transition being announced might not even exist.

**Is NTIA already violating the Congressional defund barring the transition of the IANA functions passed the past two years?**

In Singapore on Feb. 15, 2015, Assistant Secretary for Communications and Information at the Department of Commerce Lawrence Strickling answered a question about why he believed the National Telecommunications and Information Administration (NTIA) was still allowed to plan transitioning the Internet Assigned Numbers Authority (IANA) functions to the Internet Corporation for Assigned Names and Numbers (ICANN) in spite of a thrice-enacted prohibition<sup>23 24 25</sup> by Congress barring the use of funds to engage in said transition, including attending such conferences at taxpayer expense.

Strickling replied:

“So yes there was a rider attached into our budget in the budget bill last December that said that we can’t spend appropriated dollars to complete transition before the end of next September. And so we have taken that seriously and I’ve reported out that there will not be a transition before next—the end of next September. At the same time though there was some commentators, not necessarily anybody with any expertise were saying ah this shuts down NTIA. They have to sit on the sidelines and not do anything. You know, like our hands are tied. And so that concerned us. We didn’t read the bill that way or the law that way and we’ve consulted with—informally with both the House and the Senate, both Democrats and Republicans to get an understanding as to what exactly they intended. So one of the things was even in the rider it said you must provide us regular reports and updates on how the transition is going. So they clearly intended us to do things like come to the ICANN meetings and watch and report back what’s going on. We clearly are participating in the GAC and none of that affects that. And the only real issue was to what extent do we provide feedback during the process to the community. And on that, you know, the assurances I got from most of the staff on the Hill was they didn’t see any problem with that because . . . we want to protect the interests of the United States in all of this.”<sup>26</sup>

Americans for Limited Government Foundation President Nathan Mehrens has filed a complaint with the Commerce Department Inspector General David Smith on Feb. 1,<sup>27</sup> stating, “Despite the explicit prohibition, the NTIA is clearly engaged in activities that are designed to lead to the relinquishment of its responsibilities

<sup>15</sup> <http://online.wsj.com/news/articles/SB10001424052702303802104579453263393882136>

<sup>16</sup> <http://getliberty.org/wp-content/uploads/2014/03/DOC-NTIA-FOIA-re-ICANN-03-27-14.pdf>

<sup>17</sup> [http://getliberty.org/wp-content/uploads/2014/06/DOC-NTIA\\_FOIA-Responsive-Docs-Set1.pdf](http://getliberty.org/wp-content/uploads/2014/06/DOC-NTIA_FOIA-Responsive-Docs-Set1.pdf)

<sup>18</sup> <http://online.wsj.com/articles/gordon-crovitz-au-revoir-to-the-open-internet-1404076280>

<sup>19</sup> [http://getliberty.org/wp-content/uploads/2015/06/DOC-NTIA\\_FOIA-Responsive-Docs-Set2.pdf](http://getliberty.org/wp-content/uploads/2015/06/DOC-NTIA_FOIA-Responsive-Docs-Set2.pdf)

<sup>20</sup> <https://getliberty.org/wp-content/uploads/2016/03/NTIAFOIA3rdSet-3-14-16.pdf>

<sup>21</sup> <https://getliberty.org/wp-content/uploads/2016/03/NTIAFOIAResponse4thSet3-18-16.pdf>

<sup>22</sup> <https://getliberty.org/wp-content/uploads/2016/01/NTIAFOIAResponse1-7-2016.pdf>

<sup>23</sup> PL 114–113, H.R. 2029, Section 539.

<sup>24</sup> PL 114–53, H.R. 719, Section 101.

<sup>25</sup> PL 113–235, H.R. 83, Section 540.

<sup>26</sup> <http://singapore52.icann.org/en/schedule/tue-ncuc/transcript-ncuc-10feb15-en.pdf>

<sup>27</sup> [https://getliberty.org/wp-content/uploads/2016/03/NPM-Complaint-to-DOC-IG-Re-NTIA-Antideficiency-Act\\_02.01.16.pdf](https://getliberty.org/wp-content/uploads/2016/03/NPM-Complaint-to-DOC-IG-Re-NTIA-Antideficiency-Act_02.01.16.pdf)

regarding Internet domain name system functions, including responsibility with respect to the authoritative root zone file and the Internet Assigned Numbers Authority functions. The NTIA personnel have traveled to numerous conferences on Internet governance and speeches from NTIA personnel clearly indicate that they are moving ahead as if Congress had not acted to prohibit their very actions.”

As for Strickling’s citing of reporting requirements that were included in the spending bills, these do not authorize working on the relinquishment of the IANA functions specifically because they cannot supersede the statute.

In the 2015 omnibus spending bill, Congress required NTIA to submit a report due January 30 “regarding any recourse that would be available to the United States if the decision is made to transition to a new contract and any subsequent decisions made following such transfer of Internet governance are deleterious to the United States.”<sup>28</sup> That does not authorize any work on relinquishing the Internet, except to produce NTIA’s backup plan in case anything went wrong with such a transition.

Congress also directed “NTIA to inform appropriate Congressional committees not less than 45 days in advance of any such proposed successor contract or any other decision related to changing NTIA’s role with respect to ICANN or IANA activities.”<sup>29</sup>

This reporting requirement was not fully followed when NTIA most recently unilaterally modified its contract with ICANN on August 4 allowing for a short-term extension.<sup>30</sup> According to NTIA Administrator Strickling, Congress was not notified of the contract extension until Friday, August 14, after the modification to the contract had already gone into effect.<sup>31</sup>

Again, these reporting requirements were very specific and narrowly tailored to ensure Congress would be notified of any changes to the NTIA contract with ICANN and of the agency’s contingency plan in case any IANA functions transition goes awry. None of them authorized continued work on the transition.

As for the claim by Strickling that he informally consulted with Congressional staff about the intent of the prohibition, that is no legal standard whatsoever. As Mehrens noted in the Inspector General complaint, “it is not Hill staff that decide whether there is a problem, but rather the actual language passed by Congress should be examined.”

Americans for Limited Government Foundation has since been informed by the Inspector General that they have referred the matter for an investigation.

As Congress works to affirm its commitment to restoring the Constitution’s Article I separation of powers, including the power of the purse, a great place to start would be with prohibitions on the use of funds that Congress has already enacted. With NTIA clearly violating the prohibition barring the use of funds to engage in the IANA functions transition, plus not even meeting with the reporting requirements set for by Congress in the 2015 omnibus spending bill, there should be legislative redress, and that should be requiring NTIA to extend the current contract with ICANN for another two years.

## Conclusion

While many of my esteemed fellow panelists today will be examining in great depth the multistakeholder plan for NTIA’s transition of the IANA functions, and rightly so, the testimony I intend to deliver today is much more of a gut check. Mr. Chairman, the real questions you must consider today and the days that follow are whether NTIA—and indeed the members of this committee and Congress as a whole—have done their own due diligence. That is, in ensuring whether this proposed transition is even lawful, serves U.S. interests and preserves the free and open Internet that we all today take for granted. And finally, whether surrendering oversight of the Internet’s names and numbers is even a good idea.

Failing in these key pillars, we risk creating an unaccountable Internet that is beyond any law or authority, acts openly against U.S. interests and is anything but free and open. One that taxes users of the Internet at will, tramples upon property rights and threatens the religious and civic liberties of peoples around the world. Or, one that is no longer authoritative, splinters into multiple root zones and cannot maintain control over its framework as it splits into irreconcilable chaos, hindering global communications and commerce.

<sup>28</sup> [http://www.circleid.com/posts/20141210\\_breaking\\_us\\_government\\_funding\\_bill\\_delays\\_iana\\_transition/](http://www.circleid.com/posts/20141210_breaking_us_government_funding_bill_delays_iana_transition/)

<sup>29</sup> [http://www.circleid.com/posts/20141210\\_breaking\\_us\\_government\\_funding\\_bill\\_delays\\_iana\\_transition/](http://www.circleid.com/posts/20141210_breaking_us_government_funding_bill_delays_iana_transition/)

<sup>30</sup> [https://www.ntia.doc.gov/files/ntia/publications/mod\\_0003\\_for\\_sa1301-12-cn-0035\\_signed.pdf](https://www.ntia.doc.gov/files/ntia/publications/mod_0003_for_sa1301-12-cn-0035_signed.pdf)

<sup>31</sup> <https://www.ntia.doc.gov/blog/2015/update-iana-transition>

Today, the Internet works.

It is free and open. Users of the Internet, high and low, have a ready, robust recourse in Federal courts to adjudicate any and all First Amendment claims should censorship ever occur in the fulfillment of the current U.S. Government contracts and cooperative agreements. That it hasn't occurred is a testament to the virtue of the current U.S. oversight. But members of this committee should not take false comfort or become complacent. Much like the U.S. nuclear deterrent, we do not consider the absence of a nuclear exchange as reason to suddenly begin disarming our vast arsenal of warheads. U.S. oversight of the Internet has enabled the Internet to take on our uniquely American character for openness and entrepreneurship. Somebody has to be standing on the wall, and it is undoubtedly better to have the current, underappreciated constitutional system that says the root zone operator, ICANN, a U.S. Government contractor, cannot violate the First Amendment rights of anyone who uses the Internet or else they go to court—than to leave it to the forces of globalization and profit, or foreign powers who might capture the function, to determine what shall be free and what shall be open.

In 1998, groups like the Electronic Frontier Foundation (EFF) criticized the transfer of DNS to a private foundation like ICANN. "Internet administration has always guaranteed free speech and due process, since it has been done by U.S. Government contractors who are required to follow the U.S. Constitution. If the New IANA moves Internet administration out from under the U.S. Government, as there is general agreement to do, the public will lose these guarantees," Shari Steele, Staff Counsel at EFF warned at the time.<sup>32</sup> These concerns have not been raised since, and certainly not during this process.

The Internet as we know it depends on there being a single, authoritative source for the names and numbers in order to work. For, while the government-overseen contracts and agreements are in place to establish the rules of the road, ICANN, Verisign, the regional registries, etc. are all shielded from antitrust scrutiny. Such pitfalls of collusion, monopoly power and price gouging might have arisen otherwise if the Internet had been brought up singularly in the private sector. Instead today's single, usable and affordable Internet, again, is a virtue of U.S. oversight. It is a monopoly, yes, but a regulated one that can be pulled back if needs be, where claims of U.S. Government property over the IANA functions act simply as a failsafe—just in case anything goes wrong. We must consider whether trading the current system for a single, unaccountable monopoly beyond law or competition, or one that could be subject to antitrust suits the moment it engages in anticompetitive activities, splintering the Internet, could actually be a far worse outcome. Antitrust law challenges to the IANA functions were fully anticipated in the 1998 statement of policy: "Applicable antitrust law will provide accountability to and protection for the international Internet community. Legal challenges and lawsuits can be expected within the normal course of business for any enterprise and the new corporation should anticipate this reality."<sup>33</sup> But throughout this entire process, nobody has really considered the antitrust fallout of the transition.

The Internet in its current form is in fact held accountable by the U.S. contracts. In 2012, NTIA put up the IANA functions for a request for proposals,<sup>34</sup> to see if anybody else besides ICANN might perform the functions but, mostly, to ensure that ICANN realized its authorities could be revoked as a fallback if the U.S. deemed it necessary.

<sup>32</sup> [https://w2.eff.org/Infrastructure/DNS\\_control/ICANN\\_IANA\\_IAHC/19980924\\_eff\\_new\\_iana\\_pressrel.html](https://w2.eff.org/Infrastructure/DNS_control/ICANN_IANA_IAHC/19980924_eff_new_iana_pressrel.html)

<sup>33</sup> "Applicable antitrust law will provide accountability to and protection for the international Internet community. Legal challenges and lawsuits can be expected within the normal course of business for any enterprise and the new corporation should anticipate this reality. The Green Paper envisioned the new corporation as operating on principles similar to those of a standard-setting body. Under this model, due process requirements and other appropriate processes that ensure transparency, equity and fair play in the development of policies or practices would need to be included in the new corporation's originating documents. For example, the new corporation's activities would need to be open to all persons who are directly affected by the entity, with no undue financial barriers to participation or unreasonable restrictions on participation based on technical or other such requirements. Entities and individuals would need to be able to participate by expressing a position and its basis, having that position considered, and appealing if adversely affected. Further, the decision making process would need to reflect a balance of interests and should not be dominated by any single interest category. If the new corporation behaves this way, it should be less vulnerable to antitrust challenges." *Federal Register* Volume 63, Number 111 published on Wednesday, June 10, 1998, Pages 31741–31751, <http://www.gpo.gov/fdsys/pkg/FR-1998-06-10/html/98-15392.htm>

<sup>34</sup> [https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=337abfa3fa508d260738052baf46bd9&\\_cview=1](https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=337abfa3fa508d260738052baf46bd9&_cview=1)



A fallback plan, mind you, that without the current contract, the U.S. will lack. In the 2015 omnibus spending bill, Congress required NTIA to submit a report due January 30 “regarding any recourse that would be available to the United States if the decision is made to transition to a new contract and any subsequent decisions made following such transfer of Internet governance are deleterious to the United States.”<sup>35</sup>

In response in its first quarterly report, NTIA told Congress that “Our preliminary answer is that the criteria for the plan that NTIA established in its March 2014 announcement will ensure an outcome that is not ‘deleterious’ to the United States.”<sup>36</sup>

Besides this vague assurance, NTIA never produced its contingency plan should the IANA functions transition harm U.S. interests in its subsequent quarterly reports to Congress.<sup>37 38 39 40 41</sup> That is to say, Mr. Chairman, there is no backup plan should the Internet become an unaccountable monopoly, subjected to foreign capture or broken into hundreds of pieces—even though Congress required there to be such a plan. You’ve got the plan for transition, but no fallback position.

In short, the dangers of the IANA functions transition and leaving U.S. oversight behind include:

- (1) The plan necessarily lacks First Amendment protections for the Internet naming conventions because the government contract is the only way for anybody to invoke the First Amendment;
- (2) The plan lacks antitrust protections for ICANN without the government contract, and Congress does not appear to anticipate any need to offer an antitrust exemption to ICANN. Not that it should, as it might lead to other unintended consequences;
- (3) The plan lacks Congressional authority;
- (4) The plan could lead to an Internet that is either an unaccountable monopoly or one that is fractured, either way it could end up being less free and open;
- (5) Neither Congress nor NTIA has any backup plan if anything goes wrong.

Thank you for allowing me to present Americans for Limited Government’s rationale for ardently opposing the proposed transition.

The CHAIRMAN. Thank you, Mr. Manning.  
Mr. Schafer?

**STATEMENT OF BRETT D. SCHAEFER, JAY KINGHAM FELLOW,  
INTERNATIONAL REGULATORY AFFAIRS, THE HERITAGE  
FOUNDATION**

Mr. SCHAEFER. Mr. Chairman, members of the Committee, thank you for inviting me to testify.

It has been more than two years since NTIA announced that it intended to end its current contract with ICANN and called for ICANN to coordinate the development of a proposal for transitioning key Internet functions to the global multistakeholder community. NTIA caught many in the Internet community by surprise with this announcement. After all, the proposed transition was not driven by problems or failings within the current IANA process or the U.S. role within that process. The process was working well and was providing a platform for the Internet to continue

<sup>35</sup> [http://www.circleid.com/posts/20141210\\_breaking\\_us\\_government\\_funding\\_bill\\_de-lays\\_iana\\_transition/](http://www.circleid.com/posts/20141210_breaking_us_government_funding_bill_de-lays_iana_transition/)

<sup>36</sup> [http://www.ntia.doc.gov/files/ntia/publications/iana\\_report\\_013015.pdf](http://www.ntia.doc.gov/files/ntia/publications/iana_report_013015.pdf)

<sup>37</sup> [https://www.ntia.doc.gov/files/ntia/publications/ntia\\_second\\_quarterly\\_iana\\_report\\_05.07.15.pdf](https://www.ntia.doc.gov/files/ntia/publications/ntia_second_quarterly_iana_report_05.07.15.pdf)

<sup>38</sup> [https://www.ntia.doc.gov/files/ntia/publications/ntia\\_iana\\_third\\_quarterly\\_report.pdf](https://www.ntia.doc.gov/files/ntia/publications/ntia_iana_third_quarterly_report.pdf)

<sup>39</sup> [https://www.ntia.doc.gov/files/ntia/publications/iana\\_transition\\_report\\_to\\_congress\\_fourth\\_quarterly\\_11.02.15.pdf](https://www.ntia.doc.gov/files/ntia/publications/iana_transition_report_to_congress_fourth_quarterly_11.02.15.pdf)

<sup>40</sup> [https://www.ntia.doc.gov/files/ntia/publications/ntia\\_iana\\_fifth\\_quarterly\\_report\\_to\\_congress.pdf](https://www.ntia.doc.gov/files/ntia/publications/ntia_iana_fifth_quarterly_report_to_congress.pdf)

<sup>41</sup> <https://www.ntia.doc.gov/files/ntia/publications/iana-transition-quarterly-report-05162016.pdf>

its fantastic success and growth. If it was not broken, then why fix it?

The answer was international politics of an opportunistic and cynical variety. Other governments, particularly repressive regimes that are interested in constraining free speech and political discourse online, have sought for years to internationalize Internet governance. This disclosure has added a new complication and led the U.S. to announce the transition out of concern that it could no longer thwart efforts to have the ITU intrude into Internet governance. This decision may have provided temporary reprieve, but it is no solution. Regardless of whether the transition occurs or U.S. stewardship continues, China, Russia, and other likeminded governments will not cease their attempts to regulate and censor the Internet domestically through the U.N. or by asserting whatever leverage they can within and upon ICANN. Approving the transition will not satisfy the ambitions of these governments. It will only whet their appetite.

From the very beginning, I and my colleagues at Heritage have consistently opposed increased government authority over ICANN and the Internet. In fact, less than a month after the NTIA announcement, my colleague, Paul Rosenzweig, testified that he opposed the notion that government should have a formal membership role in ICANN. Paul and I have engaged heavily in the ICANN working group discussions on the transition proposal. But our overriding concern, voiced in publications and ICANN discussions, has been to prevent the expansion of government authority beyond its current advisory role.

I respect the work and time invested to develop the transition proposal, which includes a number of sound recommendations to improve accountability. However, a number of concerns remain.

First, the near certainty that there are errors and omissions in ICANN's revised bylaws which have doubled in size as a result of the transition proposal and the accountability of reforms. These oversights will likely go undiscovered due to a politically compressed timeline which leaves no adequate period for testing the new mechanisms.

Second, fundamental and controversial issues such as human rights and legal jurisdiction that will not be resolved prior to the transition.

Third, questions about how our stress tested solutions will work under real-world pressures and whether the ICANN community can adequately muster the sustained will and cohesion to effectively use them.

Most critically, despite our best efforts, governments would have more power and influence in ICANN than is the case today, as I discuss in greater length in my written testimony. The threshold for the Board to reject government advice has been raised, and governments will for the first time have the power to vote on bylaw changes, dismissal of the Board, ICANN's budget, and other major decisions.

Worth noting is that the consensus requirement does not apply to GAC decisionmaking in the EC, in the Empowered Community. It only applies to the Board advice. And it is also worth noting that the Board alone decides whether the GAC advice has materially af-

fects the decision that results from the Board's decision. For this reason alone, I would oppose the transition.

But even if you find the expansion of government authority inside of ICANN acceptable, the fact that what we are considering is untested should give you pause. Adopting the fundamental changes to ICANN outlined in the transition proposal, while simultaneously ending the historical U.S. contractual relationship with ICANN, is tantamount to a strategy of cut the rope and hope. Everything could work out just as we envision it will. But then, again, we might encounter serious problems. Hope is no substitute for rigorous empirical real-world testing.

After the transition, the ability of the U.S. to provide support for the ICANN community's future demands that the ICANN Board adopt additional changes would be far less than if the current contractual arrangement remains in place. Over the past 2 years, with the transition online, the ICANN Board has repeatedly resisted efforts to maximize accountability. That is not a good sign. Without the leverage of U.S. oversight, the Board would be even less accommodating. In short, we have once chance to get this right.

Currently, ICANN and Verisign are engaged in a parallel testing period for the new IANA process to make sure that if the transition occurs, the new process will be reliable. I believe we should also parallel test the governance and accountability measures we are proposing. This is why I would recommend, at the very least, a soft extension of the current contract. Importantly, this would not derail the progress that has been made. The ICANN Board has confirmed that nearly all of the recommended changes, including the new accountability improvements, will be adopted and implemented regardless of whether the transition proceeds or not.

A soft extension of the current contract for a reasonable period of time, say, for 2 years, would allow the community and ICANN to take the new mechanisms for a sustained test drive to verify that the new governance model works as we hope that it will. It will also continue U.S. oversight as the details of Work Stream 2 are fully fleshed out.

In conclusion, let me make clear that I am not opposed to the transition. But the transition need not happen this September, nor need it happen exactly under the terms of this current proposal. Extending the contract does pose risks, but so does ending U.S. oversight before we know that the new ICANN will work as envisioned.

NTIA and ICANN have repeatedly stated that it is better to get this done right than to get it done in any specific timeline, and I fully agree with that statement. The transition to a multistakeholder ICANN is too important to get wrong, and it is too important to rush.

Thank you very much, and I look forward to your questions.  
[The prepared statement of Mr. Schafer follows:]

PREPARED STATEMENT OF BRETT D. SCHAEFER, JAY KINGHAM FELLOW,  
INTERNATIONAL REGULATORY AFFAIRS, THE HERITAGE FOUNDATION

My name is Brett Schaefer and I am the Jay Kingham Fellow in International Regulatory Affairs at The Heritage Foundation. The views I express in this statement for the record are my own and should not be construed as representing any official position of The Heritage Foundation.

A critical change in Internet governance is imminent. It has been two years since the National Telecommunications and Information Administration (NTIA), an arm of the U.S. Department of Commerce, announced that it intended to end its current contract with the Internet Corporation for Assigned Names and Numbers (ICANN) and “transition key Internet domain name functions to the global multistakeholder community.”<sup>1</sup>

Now the U.S. Government is on the verge of giving up its historical role in overseeing changes in the Domain Name System (DNS), the policy apparatus and technological method that assigns names and numbers on the Internet. It is the system, for example, that ensures that “Heritage.org” refers to The Heritage Foundation and not some hypothetical ancestry and heritage group. If things proceed as proposed, the DNS system will be run independently under ICANN with oversight performed by a new international multistakeholder entity. As the Administration and Congress consider the transition, projected to be completed by the end of September 2016, they should proceed with caution.

In its 2014 announcement, before the transition could occur, the NTIA required ICANN to develop a formal proposal that would assure the U.S. that the termination of its contractual relationship would not threaten the security and openness of the Internet, undermine the bottom-up multistakeholder process, or replace the current role of the NTIA with a government-led or intergovernmental organization solution. That proposal was finalized and approved by the relevant groups in ICANN, known as supporting organizations and advisory committees (SO/ACs), and the ICANN board.<sup>2</sup> Draft bylaws intended to reflect the changes recommended in the Cross Community Working Group (CCWG-Accountability) and the IANA Stewardship Transition Coordination Group (ICG) proposals have been drafted and posted for public comment by ICANN.

I and my colleague Paul Rosenzweig participated extensively in this process through our research and publications, submissions to ICANN’s public comment process, involvement in and attendance at ICANN meetings, participation in the CCWG-Accountability meetings and remote discussions, and membership in the Non-Commercial Users Constituency and the Non-Commercial Stakeholder Group within ICANN. We have commented on and debated various proposed changes in those forums and our suggestions have in some cases been incorporated into the final CCWG-Accountability proposal and the revised bylaws.

I have great respect for the work and time that the members and participants of these groups have invested. The proposal includes a number of positive elements that, if they operate as envisioned, would create mechanisms for the ICANN community to hold the board and staff accountable and reverse imprudent decisions.

There are concerns, however. For instance, while not replacing the NTIA with a governmental or intergovernmental solution, the proposed changes would greatly enhance the power of governments within ICANN relative to the status quo. There are important issues that have yet to be fleshed out, like human rights and ICANN’s jurisdiction of incorporation and headquarters, which will be implemented in Work Stream 2 and are unlikely to be completed prior to September 2016. Although improved accountability measures would be established, it is unknown how they will work in practice. The new bylaws are twice as long as the current bylaws and establish new, untested mechanisms and procedures. Unforeseen errors, flaws, or oversights could lie unnoticed.

Uncertainty with regard to how this new ICANN structure would operate should lead the U.S. to retain some oversight until there is confidence that it will work smoothly as envisioned. To that end, I recommend a “soft extension” of the existing contractual relationship—one that allows ICANN two years to demonstrate that the new procedures it is putting in place actually work to hold the corporation accountable. The transition to a multistakeholder global system is too important to get wrong and too important to rush.

### **A Long, Difficult Process**

In March 2014, the NTIA announced that it intended “to transition key Internet domain name functions to the global multistakeholder community” and asked ICANN to convene a group of global stakeholders to develop a proposal on a new process to replace the NTIA’s “procedural role of administering changes to the au-

<sup>1</sup>News release, “NTIA Announces Intent to Transition Key Internet Domain Name Functions,” National Telecommunications and Information Administration, March 14, 2014, <http://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions> (accessed March 15, 2016).

<sup>2</sup>News release, “Plan to Transition Stewardship of Key Internet Functions Sent to the U.S. Government,” ICANN, March 10, 2016, <https://www.icann.org/news/announcement-2016-03-10-en> (accessed March 15, 2016).

thoritative root zone file—the database containing the lists of names and addresses of all top-level domains.”<sup>3</sup> In that announcement, however, NTIA stated:

NTIA has communicated to ICANN that the transition proposal must have broad community support and address the following four principles:

- Support and enhance the multistakeholder model;
- Maintain the security, stability, and resiliency of the Internet DNS;
- Meet the needs and expectation of the global customers and partners of the IANA [Internet Assigned Number Authority] services; and,
- Maintain the openness of the Internet.

Consistent with the clear policy expressed in bipartisan resolutions of the U.S. Senate and House of Representatives (S.Con.Res.50 and H.Con.Res.127), which affirmed the United States support for the multistakeholder model of Internet governance, NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.<sup>4</sup>

After the NTIA made its announcement, ICANN quickly convened the IANA Stewardship Transition Coordination Group (ICG), comprised of three sub-groups: the Cross Community Working Group on Stewardship (CWG-Stewardship); Numbering Resources (CRISP Team); and Protocol Parameters (IANAPLAN Working Group).<sup>5</sup> This effort focused on the technical questions raised by the transition and how the gaps in process resulting from the withdrawal of the NTIA would be filled. The relatively narrow focus of this effort, combined with the earlier start, led to the ICG proposal being largely complete by January 2015.

To their credit, however, many in the ICANN community made clear that they would not be satisfied with a narrow technical proposal that only addressed the gaps arising from the end of the U.S. contractual relationship with ICANN. They insisted that long-standing concerns about insufficient transparency and accountability within ICANN and its decision-making process needed to be addressed before the transition occurred.

An initial attempt by the ICANN board to lead this process raised strong objections from the ICANN community, which was concerned that the board would not develop or support robust accountability measures that would allow the community to block objectionable board decisions or recall the board. An unprecedented unanimous statement from all of the stakeholder groups and constituencies that make up ICANN’s Generic Names Supporting Organization (gNSO)<sup>6</sup> rebuked the board for trying to control this process and called for “creation of an independent accountability mechanism that provides meaningful review and adequate redress for those harmed by ICANN action or inaction in contravention of an agreed upon compact with the community.”<sup>7</sup>

After several months of negotiation, the board and the community agreed to establish the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability), which held its first meeting in December 2014. Since then, the CCWG-Accountability’s 28 members and 203 participants—including myself and Paul Rosenzweig—dedicated enormous effort to developing a robust accountability

<sup>3</sup>News release, “NTIA Announces Intent to Transition Key Internet Domain Name Functions.”

<sup>4</sup>*Ibid.*

<sup>5</sup>For a descriptive chronology and the ICG proposal, see IANA Stewardship Transition Coordination Group (ICG), *Proposal to Transition the Stewardship of the Internet Assigned Numbers Authority (IANA) Functions from the U.S. Commerce Department’s National Telecommunications and Information Administration (NTIA) to the Global Multistakeholder Community*, March 2016, <https://www.icann.org/en/system/files/files/iana-stewardship-transition-proposal-10mar16-en.pdf> (accessed March 15, 2016).

<sup>6</sup>The gNSO is one of three “supporting organizations” in ICANN. It is by far the largest and provides ICANN with policy advice relating to generic names—most of the domain names on the Internet in the .org, .edu, .com, and other top-level domains (TLDs), including all of the relatively new gTLDs like .biz and .net. The country code name supporting organization (ccNSO) provides advice relating to country code domains—for example, the .uk that signifies the United Kingdom. The address supporting organization (ASO) provides advice regarding IP addresses—the unique numbers given to all computers connected to the Internet.

<sup>7</sup>Brett Schaefer and Paul Rosenzweig, “Fireworks Erupt at ICANN’s London Meeting,” *The Daily Signal*, June 29, 2014, <http://dailysignal.com/2014/06/29/fireworks-erupt-icanns-london-meeting/> (accessed March 15, 2016).

proposal. As of March 2016, the group had held 209 meetings and calls consuming a total of 404 hours and had exchanged 12,430 e-mails on the proposal.<sup>8</sup>

The final draft of their proposal was approved by the chartering organizations and the ICANN board at a meeting in early March, and the board has now transmitted the ICG and CCWG-Accountability proposals to the NTIA. Both proposals were analyzed and revisions were made to ICANN's bylaws to reflect their recommendations and posted for public comment by ICANN. The NTIA has announced that it will review the combined proposal to determine whether it meets the criteria set forth and will consult with Congress as the transition moves forward.<sup>9</sup>

*Board Interference and Procedural Irregularities.* A number of challenges arose in this process beyond the normal differences of opinion and approach inherent in negotiating an important document between groups with different equities. High among these challenges was the tendency of the ICANN board to act as a participant in the process rather than as a recipient of the proposal as devised by the multistakeholder community.

When queried, former ICANN Chief Executive Officer Fadi Chehadé assured Congress that the board would allow the multistakeholder community to develop the accountability plan independently and would transfer it forward to the NTIA even if it contained provisions that the board opposed.<sup>10</sup> The board, however, did not adhere to this promise and instead intervened to shape the proposal in fundamental ways and block provisions that it opposed.

Most notable was the board's opposition to the Cross Community Working Group on Enhancing ICANN Accountability Second Draft Report (Work Stream 1) because it recommended making ICANN into a member-based nonprofit corporation with the SO/ACs jointly comprising a single member called the "Sole Member Model."<sup>11</sup> Under California law, which is the relevant law because ICANN is currently incorporated in California, this model would have given the community significant authority over the board in much the same way that shareholders have control of for-profit corporations.

The board objected to membership for several reasons that it thought could be potentially destabilizing. Prominent among them was the board's concern that the "Sole Member Model would bring with it statutory rights that could impact ICANN and its operations, without any fiduciary duty to ICANN."<sup>12</sup> In other words, the board objected to membership even though it was a standard California method of governance in nonprofit organizations because, in its view, the model gave the membership too much power over ICANN's operations.

In the face of the board's opposition, the CCWG-Accountability backed down and did not insist that the board transfer the proposal to the NTIA as promised to Congress. Instead, the CCWG-Accountability dramatically altered the proposal, wasting weeks and perhaps months of work. A new proposal titled "CCWG-Accountability—Draft Proposal on Work Stream 1 Recommendations" was submitted to public comment on November 30.<sup>13</sup> This proposal abandoned the membership model and suggested a "Sole Designator Model" that would consolidate the SO/ACs as a group into a "designator," later called the Empowered Community (EC). Under California law,

<sup>8</sup> ICANN, "IANA Stewardship Transition and Enhancing ICANN Accountability Engagement and Participation Statistics," March 2014–March 2016, <https://www.icann.org/resources/pages/iana-accountability-participation-statistics-2015-11-04-en> (accessed March 15, 2016).

<sup>9</sup> Lawrence E. Strickling, Assistant Secretary of Commerce for Communications and Information and NTIA Administrator, "Reviewing the IANA Transition Proposal," National Telecommunications and Information Administration, March 11, 2016, <https://www.ntia.doc.gov/blog/2016/reviewing-iana-transition-proposal> (accessed March 15, 2016).

<sup>10</sup> ICANN CEO Fadi Chehadé promised the Senate that "if the stakeholders present [ICANN] with [such] a proposal [we] will give it to NTIA, and we committed already that we will not change the proposal." Hearing, *Preserving the Multistakeholder Model of Internet Governance*, Committee on Commerce, Science and Transportation, U.S. Senate, February 25, 2015, <http://www.commerce.senate.gov/public/index.cfm/2015/2/preserving-the-multistakeholder-model-of-internet-governance> (accessed March 15, 2016).

<sup>11</sup> ICANN, "Cross Community Working Group on Enhancing ICANN Accountability 2nd Draft Report (Work Stream 1)," Public Comment, August 3, 2015, <https://www.icann.org/public-comments/ccwg-accountability-2015-08-03-en> (accessed March 15, 2015).

<sup>12</sup> Quoted from ICANN board, "Frequently Asked Questions Regarding Approach for Community Enforceability," September 11, 2015, <http://forum.icann.org/lists/comments-ccwg-accountability-03aug15/msg00045.html> (accessed March 15, 2016). For the entire comment, see ICANN board, "ICANN Board Submission of Supplementary and Final Comments to the CCWG—Accountability 2nd Draft Proposal Public Comment Forum," September 11, 2015, <http://forum.icann.org/lists/comments-ccwg-accountability-03aug15/msg00045.html> (accessed March 15, 2016).

<sup>13</sup> ICANN Public Comment, "CCWG-Accountability—Draft Proposal on Work Stream 1 Recommendations," November 30, 2015, <https://www.icann.org/public-comments/draft-ccwg-accountability-proposal-2015-11-30-en> (accessed March 15, 2016).

a designator has far more limited powers than a member. To address these gaps, the proposal would grant specified powers to the EC through new or amended bylaws. Notwithstanding the gap-filling effort, this shift in the model of governance undoubtedly weakened the legal standing and independence of the ICANN community as compared to a member organization. Specifically, many powers would be subject to change through bylaw amendment and would lack the guarantees of statute in California law—that is, an authority external to ICANN.<sup>14</sup>

Other significant board interventions occurred during the process and even after the report was supposed to be final. As noted by ICANN’s Intellectual Property Constituency (IPC) in its comment to the gNSO:

[A] last minute, Board-initiated change was made less than two weeks before the commencement of ICANN 55 and the deadline for CCWG Chartering Organization decisions whether to approve or reject the Final Proposal. The Board-initiated change did not involve a fringe issue; rather it went to the heart of the proposal, and in particular the balance of government interests and private sector interests.<sup>15</sup>

The board’s comment led to changes in the proposal even though that stage of the process had officially closed and only copyedits and corrections were being accepted. This procedural irregularity was not unique. As noted by the IPC:

While the effort of the CCWG has spanned 14 months, many of the details ultimately provided in the Proposal were not completely articulated until the Third Draft Proposal circulated in late Fall 2015. . . . Review of the final proposal between publication and the Marrakech meeting, as well as the earlier truncated comment period for the Third Draft Proposal, which fell during the Winter holidays, required herculean efforts to review, digest and (when called for) draft responsive comments. Given their importance, it is unfortunate that the proposed changes to ICANN governance and accountability mechanisms were fast tracked.<sup>16</sup>

Despite the fact that the NTIA and ICANN repeatedly assured Congress that it was more important to get this transition right than to get it done on time, these procedural compromises were deemed necessary because of a perceived need to meet political deadlines. The NTIA has the ability to extend the U.S. oversight role through September 2019, but there is a keen desire in ICANN, the NTIA, and among many in the community to get the transition done before the 2016 U.S. presidential election out of concern that a new Administration might not support the timeline. It is uncertain whether the report contains unnoticed problems or oversights that could impair ICANN operations or governance, but if they do surface after the transition occurs, this politically driven haste would be partially to blame for the failure to vet this proposal diligently.

#### Final CCWG Report: Good and Bad

The CCWG-Accountability proposal, titled the *Supplemental Final Proposal on Work Stream 1 Recommendations*, was finalized on February 23 and supported by all seven SO/ACs<sup>17</sup> and the ICANN board at the ICANN 55 public meeting in Marrakech on March 4–10. The document is incredibly detailed and totals 346 pages, including 15 annexes and another 11 appendices.<sup>18</sup> The impact on the bylaws is

<sup>14</sup>This is by no means the only such board intervention. In fact, the very start of this process began poorly with the ICANN board authorizing the CEO to “explore ways to accelerate [an] end of U.S. stewardship” without consulting the ICANN community or making the decision public. For a detailed chronology, see Jordan Carter, “Chronology of Recent ICANN Accountability Milestones,” October 9, 2015, <https://internetnz.nz/sites/default/files/2015-10-09-ICANN-accty-chrono.pdf> (accessed March 15, 2016).

<sup>15</sup>ICANN/GNSO, “Transmittal of results of GNSO Council consideration of CCWG-Accountability Supplemental Final Proposal,” March 9, 2016, p. 5, <http://mm.icann.org/pipermail/ac-countability-cross-community/attachments/20160309/f1b5ce45/CCWG-Accountabilitytransmittalofresults-9March2016-0001.pdf> (accessed March 15, 2016).

<sup>16</sup>*Ibid.*, pp. 5–6.

<sup>17</sup>In addition to the supporting organizations, ICANN has four advisory committees (ACs) that are intended to advise the ICANN community and the ICANN board on specific policy issues or to represent the views and opinions of parts of the ICANN community that are not integrated into the supporting organizations. The four ACs are the At-Large Advisory Committee (ALAC); Governmental Advisory Committee (GAC); Root Server System Advisory Committee (RSSAC); and Security and Stability Advisory Committee (SSAC).

<sup>18</sup>CCWG-Accountability, *Supplemental Final Proposal on Work Stream 1 Recommendations*, February 23, 2016, <https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf> (accessed March 23, 2016).

similarly large—the ICANN bylaws as revised (in draft form, at this point) to reflect the ICG and the CCWG-Accountability proposals are more than twice the size, both in terms of pages and number of words, as the current bylaws. The changes substantially revise ICANN’s accountability mechanisms, establish two new entities within ICANN, and outline a number of important issues that will be developed in the coming months or years to be incorporated into the bylaws and ICANN’s operations.

The extent of the changes and the need to be familiar with ICANN’s structure and processes make it very difficult to comprehend the proposal for those who have not been intimately involved in the transition process. This will prove to be a barrier to efforts in Congress to exercise due diligence in scrutinizing the report. In an effort to assist congressional scrutiny, I will highlight significant positive and negative elements of the proposal.

*Positive Elements.* Overall, a number of positive accountability measures have been proposed and incorporated into the revised draft bylaws.

- *Limiting ICANN’s mission.* One major concern is that ICANN will see its role as broader than the technical management of the DNS system and the Internet Assigned Number Authority function, which has the responsibility for assigning names and numbers to websites. Without the backstop provided by the NTIA contract, some in the ICANN community were concerned that ICANN could fall victim to mission creep that could distract the organization from its primary purpose or drain resources through support of tangential activities.

Under the CCWG-Accountability proposal, ICANN’s mission is to be “limited to coordinating the development and implementation of policies that are designed to ensure the stable and secure operation of the Domain Name System and are reasonably necessary to facilitate its openness, interoperability, resilience, and/or stability.”<sup>19</sup> The proposal also clarifies that anything not specifically articulated in the bylaws would be outside the scope and mission of ICANN. Adoption of and adherence to this mission statement would go a long way toward assuring that ICANN did not seek to become a “global guardian of the Internet” or take on responsibilities beyond its narrow remit. The draft revised bylaws reflect the limited mission as recommended by the CCWG.

- *Creating fundamental bylaws.* Certain bylaws, including those establishing new accountability mechanisms and clarifying ICANN’s mission, were deemed too important to be changed by board action alone. Under the proposal and in the revised draft bylaws, they will also require approval by the ICANN community as represented in the Empowered Community. This useful change both prevents the board from acting unilaterally on these fundamental bylaws without broader support and entrenches limits on ICANN in the form of quasi-constitutional restrictions.
- *Establishing the Empowered Community.* A new nonprofit association is to be established within ICANN called the Empowered Community, populated by five of ICANN’s SO/ACs: the Address Supporting Organization (ASO); At Large Advisory Committee (ALAC); Country Code Names Supporting Organization (ccNSO); Generic Names Supporting Organization (gNSO); and Government Advisory Committee (GAC).<sup>20</sup> The EC would have the statutory power to appoint and remove ICANN board directors, either individually or as a group, and authority under the bylaws to reject an operating plan, strategic plan, and budget proposed by the board; approve changes in fundamental bylaws; reject changes in standard bylaws; initiate a binding Independent Review Process; and reject board decisions related to reviews of the IANA functions, including triggering of any Post Transition IANA (PTI) separation.<sup>21</sup>

In addition, the revised bylaws would grant the EC the right to inspect ICANN accounting books and records, the right to investigate ICANN by means of a

<sup>19</sup>*Ibid.*, p. 26.

<sup>20</sup>The other two advisory committees, the Security and Stability Advisory Committee and Root Server System Advisory Committee, informed the CCWG-Accountability at the ICANN Public Meeting in October 2015 (ICANN 54) that they did not want to participate as decisional participants in the Empowered Community. The revised bylaws make clear that amending the fundamental bylaw listing the decisional participants of the Empowered Community would be required to reverse this decision and include SSAC and RSSAC among the decisional participants.

<sup>21</sup>The PTI is the organizational structure envisioned for technical operation of the IANA function after the NTIA contract is terminated. It is to be a sub-organization within ICANN, but the draft proposal contemplates the possibility of complete separation at some point in the future, should the need arise.



third-party audit, and mandate board engagement and consultation with the EC before approving an annual or five-year strategic plan, an annual or five-year operating plan, the ICANN annual budget, the IANA functions budget, any bylaw changes, and any decisions regarding the PTI separation process. Taken together, these changes provide significant potential power to the EC to involve itself in ICANN decisions, scrutinize ICANN activities, block undesired actions, and hold the board to account.

- *Improving the Independent Review Process (IRP) and Request for Reconsideration (RFR) mechanisms.* The IRP is an independent external arbitration review mechanism to ensure that ICANN does not go beyond its limited scope and mission through its actions or decisions and does not violate its bylaws. Under the CCWG-Accountability proposal, the IRP process would be slightly broadened in scope and made accessible to any materially affected person or party (including the EC), less costly, and more systematic through the establishment of a standing panel of independent experts in ICANN-related fields. It would also provide for interim relief if the decision could result in irreparable harm. The RFR, which any individual can use to appeal for a review of any ICANN action or inaction, would be improved by expanding the range of permissible requests, lengthening the time for filing a request, establishing firm deadlines for RFR procedures and responses, adding transparency requirements, narrowing the grounds for dismissal, and requiring the board to handle all requests directly. Both of these changes are helpful. Unfortunately, however, the RFR process does not provide for interim relief during the reconsideration process even though irreparable harm could result.

Collectively, these accountability changes are a significant improvement over the status quo. It is important to note that their implementation is not dependent on NTIA and/or congressional approval of the transition. When asked, the board confirmed that the accountability improvements in the proposal would be adopted and implemented whether the transition proceeds or not.<sup>22</sup>

*Remaining Issues of Concern.* While the changes to ICANN include many good provisions, there remain a number of concerns:

- *Lack of resolution on .mil and .gov.* Today, the United States has exclusive use of the .mil and .gov domains. Allowing other governments or the private sector to use these gTLDs poses security risks. In a July 8, 2015, hearing held by the House Energy and Commerce Committee's Subcommittee on Communications and Technology, when pressed about formalizing the informal agreement about .mil and .gov, Assistant Secretary for Communications and Information and NTIA Administrator Lawrence Strickling stated,

There is nothing in the transition of our stewardship which actually implicates .mil or .gov, and also .us, which we administer at the Department of Commerce. But we understand this is an issue of concern and so we will do whatever is appropriate, in consultation with the Department of Defense and GSA and the other agencies that have equities in this, to make sure that these names are protected going forward. We understand the importance of it.

Today, they are not under any particular contract. These are legacy names that go back to the very beginning of the Internet. I think .mil was delegated back in 1984. That shows you how old it is. So there is no contract

<sup>22</sup> A member of the Commercial Stakeholder Group asked the board to confirm that “Even in the event that there were some political problem with the transition, it is your intention that we will have implemented the bylaws changes. That the accountability reforms are done and that we will have implemented the other aspects and that political impediment to the transition will not prevent the implementation of those bylaws reforms.” ICANN board member Bruce Tonkin answered on behalf of the board: “So the only caveat in that case . . . is if the NTIA wished to continue its agreement, we would just need to make sure that any changes were not in conflict with that agreement, which really doesn’t involve much in the way of any of the accountability work that you’ve been involved in.” ICANN board member Cherine Chalaby added: “So I’d like to add to what Bruce is saying. Basically on the accountability reforms, I think the train has left the station and the reasons for that is the community has come to an agreement. I mean, if the community did not come to an agreement, it would be a different thing. So I think they are good accountability measures and we’re committed to go forward with it, even if there are political positions and such. So subject to some of the caveats that Bruce has done, we’re all in support of that.” Video and initial transcript available at ICANN Public Meetings, “Joint Meeting of the ICANN Board & the Commercial Stakeholders/Adobe Connect: Full [EN],” March 8, 2016, <https://meetings.icann.org/en/marrakech55/schedule/tue-board-csg/ac-board-csg-08mar16-en> (accessed March 15, 2016).

today, but there is a whole structure of these informal regulations within the Internet model that govern how . . .

[Question from Rep. Long] So you think informal regulations would hold up through this process?

[Sec. Strickling] There is no reason why they should change, but we are not going to rest there. We are going to take a look at them and make sure that if there is a way we can strengthen the U.S. Government's rights to those names, we will do so.<sup>23</sup>

Even though the transition may occur within a few months, NTIA has not publicly provided any detailed information on what, if anything, it intends to do to address this matter. Congress should not allow the transition to occur without securing sole U.S. ownership, control and use of these domains in perpetuity.

- *An undefined commitment to human rights.* The CCWG-Accountability proposal includes a recommendation to incorporate into the ICANN bylaws an undefined commitment to internationally recognized human rights. Implementation of this recommendation is deferred to the future under Work Stream 2.

"Internationally recognized human rights" is a very broad, imprecisely defined term, and there is no clear delineation of where internationally recognized human rights start or end. Indeed, it is a fundamental tenet in the United Nations and among the majority of human rights advocates that human rights are all interrelated, interdependent, and indivisible. More than three dozen rights are recognized in the Universal Declaration of Human Rights (UDHR); International Covenant on Civil and Political Rights (ICCPR); and International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Office of the High Commissioner for Human Rights identifies over 50 human rights issues.<sup>24</sup> New rights—the so-called third-generation human rights, which some argue should include the right to Internet access, also known as the right to broadband—are being promulgated and seriously considered even if they currently lack the acceptance of more established human rights.<sup>25</sup>

Moreover, how these rights are understood often varies from one country to another. For instance, under the U.S. Constitution, freedom of speech is an extremely broad right, but in many other countries, there are significant constraints on freedom of speech in the interests of preventing, for instance, hate speech. If ICANN adopts the more common and limited interpretation of free speech in its human rights commitment, it could create means for governments or businesses to use ICANN to moderate content.

As noted above, the proposal clarifies that anything not specifically articulated in the bylaws would be outside the scope and mission of ICANN. In addition, the draft revised bylaws stipulate that the ICANN's human right commitment to respect human rights must be "within the scope of its Mission and other Core Values" and "does not create and shall not be interpreted to create any additional obligations for ICANN and shall not obligate ICANN to respond to or consider any complaint, request or demand seeking the enforcement of human rights by ICANN, *except as provided herein.*" The final italicized clause provides a worrisome loophole that such an obligation could be created through the Work Stream 2 human rights process. The CCWG public comment on the revised bylaws recommends closing this potential loophole by strengthening the current bylaw text and eliminating the final clause: "except as provided herein."<sup>26</sup> But

<sup>23</sup> House of Representatives, Subcommittee on Communications and Technology, Committee on Energy and Commerce, "Internet Governance After ICANN 53," July 8, 2015, pp. 52–53, <http://docs.house.gov/meetings/IF/IF16/20150708/103711/HHRG-114-IF16-20150708-SD006.pdf> (accessed May 20, 2016).

<sup>24</sup> Office of the High Commissioner for Human Rights, "List of Human Rights Issues," <http://www.ohchr.org/EN/Issues/Pages/ListofIssues.aspx> (accessed March 15, 2016).

<sup>25</sup> The first generation is civil and political rights like freedom of expression and the right to due process. The second generation is economic, social, and cultural rights like the right to education and the right to housing.

<sup>26</sup> The CCWG-Accountability public comment recommends the following revision: Replace current language with the following: "(viii) Subject to the limitations set forth in Section 27.3, within the scope of its Mission and other Core Values, respecting internationally recognized human rights as required by applicable law. This Core Value does not create, and shall not be interpreted to create, any obligation on ICANN outside its Mission, or beyond obligations found in applicable law. This Core Value does not obligate ICANN to enforce its human rights obligations, or the human rights obligations of other parties, against such other parties." CCWG-Accountability, "CCWG-Accountability Comments on Draft New ICANN Bylaws," May 13, 2016, <http://forum.icann.org/lists/comments-draft-new-bylaws-21apr16/msg00004.html> (accessed May 20, 2016).

it remains uncertain if the ICANN board will incorporate this deletion in the final approved bylaws.

Even so, an unknown commitment to respect human rights will almost certainly be included in the bylaws. Therefore, there is a legitimate concern that a broad commitment to “internationally recognized fundamental human rights,” even if circumscribed by the caveat that the commitment be within the mission and scope of ICANN, would be an invitation for various civil society groups, ICANN constituencies, and governments to petition the organization to push the envelope and involve itself in human rights activities like promoting the right to the Internet or the right to development through access to information and communications technology (ICT) that could be linked to ICANN’s core values and mission or observe human rights in a manner that could be in tension with a truly free and open Internet.<sup>27</sup>

- *Enhanced power for governments.* Since the March 2014 NTIA announcement, I and my colleague Paul Rosenzweig have repeatedly cautioned against providing enhanced authority for governments in a post-transition ICANN in papers, articles, congressional testimony, and public comments submitted to ICANN on the various CCWG proposals.<sup>28</sup> In fact, less than a month after the NTIA announcement, Rosenzweig testified,

According to news reports, during the recent ICANN meeting in Singapore, the Department of Commerce appeared to accept the idea that governmental organizations would have some formal membership role in the new IANA management structure to be created by ICANN. That would be consistent with ICANN’s expressed view that “all” stakeholders should have a say in the management of the domain. I think that would be a mistake. If the premise of our decision to give up NTIA control of the IANA function is that governmental management is suspect, then that should be equally true of a governmental role (even a broader based one) in the new IANA management structure. *My recommendation would be that the governmental role in any new structure be limited to an advisory one—with no formal, or informal right of control over the process.*<sup>29</sup>

Under the current proposal, governments would significantly increase their power in ICANN versus the status quo. As it now stands, governments are represented in ICANN through the Government Advisory Committee (GAC), an advisory body that is unable to appoint board directors. The GAC has a power that other advisory bodies do not—an ability to convey advice to the board that the board must implement unless opposed by majority vote—and even if this advice is rejected, the board is obligated to try to find a mutually acceptable solution with the GAC. This special advisory role has frustrated the community

<sup>27</sup> Comment of Brett D. Schaefer and Paul Rosenzweig of The Heritage Foundation on the Human Rights Commitment in the Cross Community Working Group on Enhancing ICANN Accountability Second Draft Report (Work Stream 1), September 11, 2015, <http://forum.icann.org/lists/comments-ccwg-accountability-03aug15/msg00037.html> (accessed March 15, 2016).

<sup>28</sup> See, for instance, Paul Rosenzweig, Brett D. Schaefer, James L. Gattuso and David Inserra, “Protecting Internet Freedom and American Interests: Required Reforms and Standards for ICANN Transition,” Heritage Foundations Backgrounder #2922, June 16, 2014, <http://www.heritage.org/research/reports/2014/06/protecting-internet-freedom-and-american-interests-required-reforms-and-standards-for-icann-transition> (accessed May 20, 2016); Brett D. Schaefer, “Stakeholder Perspectives on the IANA Transition,” Testimony before Subcommittee on Communications and Technology Energy and Commerce Committee United States House of Representatives, May 13, 2015, <http://www.heritage.org/research/testimony/2015/stakeholder-perspectives-on-the-iana-transition> (accessed May 20, 2016); Brett D. Schaefer and Paul Rosenzweig, “Comment of the Heritage Foundation on the Cross Community Working Group on Enhancing ICANN Accountability 2nd Draft Report (Work Stream 1),” August 20, 2015, <http://forum.icann.org/lists/comments-ccwg-accountability-03aug15/msg00005.html> (accessed May 20, 2016); and Brett D. Schaefer and Paul Rosenzweig, “Comment on the CCWG-Accountability Draft Proposal on Work Stream 1 Recommendations,” December 16, 2015, <http://forum.icann.org/lists/comments-draft-ccwg-accountability-proposal-30nov15/msg00020.html> (accessed May 20, 2016).

<sup>29</sup> Italics added. Paul Rosenzweig, “The Proposed Transfer of the IANA Function to ICANN,” Testimony before the Subcommittee on Courts, Intellectual Property and the Internet, Committee on the Judiciary, United States House of Representatives, April 10, 2014, <https://judiciary.house.gov/wp-content/uploads/2016/02/041014-ICANN-Rosenzweig.pdf> (accessed May 20, 2016).

because it allows the GAC to intervene at late hours and upend community-led policy development processes.<sup>30</sup>

Under the current proposal, the GAC would retain this special advisory power, but with slightly different details. The threshold for board rejection of GAC advice actually increases from 50 percent to 60 percent. But the proposal also clarifies that only GAC advice that is truly adopted by consensus (without any formal objection) can trigger the board's obligation to find a mutually acceptable solution. While the definition of consensus is welcome, the higher threshold for board rejection of GAC consensus advice is a real increase in GAC authority. In addition, the higher threshold may place ICANN in legal jeopardy because California law requires that the ICANN board be in charge of decision making. This new threshold creates the possibility that a decision could be implemented over the opposition of a majority of the board.<sup>31</sup>

In addition to retaining its privileged advisory power, the GAC also would be a decisional participant in the EC with a direct say in the exercise of all community powers including, for example, board dismissal and bylaw changes.<sup>32</sup> This is somewhat moderated by the "GAC carve-out," which prohibits the GAC from being a decisional participant when the matter involves a board decision based on consensus GAC advice. This restriction is to prevent the GAC from getting two bites of the apple by being able to provide consensus advice to the

<sup>30</sup> A good example of the pernicious potential that arises from GAC intervention is the controversy that continues to plague ICANN over the question of the delegation of the .africa domain name. Initially, the board accepted the GAC's advice to favor one applicant over another—a decision that it adopted in apparent violation of its own internal procedures. The losing applicant, DotConnectAfrica, was compelled to seek redress through the Independent Review Process—an adjudication that led in the end to a declaration that the board had acted improperly. See International Centre for Dispute Resolution, Independent Review Panel, Case #50 2013 001083, *DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers*, Final Declaration, version redacted July 31, 2015, <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf> (accessed March 15, 2016). More recently, when the board sought to restart the .africa delegation (again awarding the domain to another applicant), DotConnectAfrica sought and received a temporary restraining order from a California court. See *DotConnectAfrica Trust v. Internet Corporation for Assigned Names and Numbers*, No. CV 16-00862 (C.D. Calif., Mar. 2, 2016), <https://www.icann.org/en/system/files/files/litigation-dca-minute-order-plaintiff-ex-parte-application-04mar16-en.pdf> (accessed March 15, 2016). The case remains pending, and a final adjudication on the merits has yet to be made, but it should trouble all observers that the board's apparent deference to the GAC has embroiled ICANN in such a long-running and contentious piece of litigation.

<sup>31</sup> In January, CCWG-Accountability legal advisor Rosemary Fei pointed out, "The Board under California Corporate Law has to be in charge or running the organizations of how it can exercise its fiduciary duties. And that's a basic requisite of corporate structure. And if the way it works is that if the GAC is able to come up with consensus advice, that the Board can only reject with a two-thirds vote, that means that you could have more than half the Board believe that something is not a good idea and not good for the corporation and all of those things, and still have to do it." ICANN, "Transcript CCWG ACCT CoChairs-Lawyer Meeting 8 Jan.doc" January 8, 2016, [https://community.icann.org/download/attachments/56989655/Transcript%20CCWG%20ACCT\\_CoChairs-Lawyer%20Meeting\\_820Jan.doc?version=1&modificationDate=1453041576000&api=v2](https://community.icann.org/download/attachments/56989655/Transcript%20CCWG%20ACCT_CoChairs-Lawyer%20Meeting_820Jan.doc?version=1&modificationDate=1453041576000&api=v2) (accessed May 20, 2016). Perforce, this concern would also apply to the 60 percent rejection threshold.

<sup>32</sup> It is uncertain how often or under what circumstances or procedures the GAC will be able to agree to exercise this decisional authority. The GAC failed to clarify this matter in its Marrakech statement supporting the CCWG-Accountability transition proposal, which stated, "The GAC expresses its support for the multistakeholder, bottom-up approach within ICANN and reiterates its interest in participating in the post-transition phase with a view to fulfilling its roles and responsibilities. The GAC wishes to express its sincere appreciation of the diligent and productive work performed by the CCWG-Accountability, its Co-Chairs, its members and all its contributors. The GAC reaffirms its role as an advisory committee to the ICANN Board and within the ICANN multistakeholder environment and will continue to advise on relevant matters of concern with regard to government and public interests. The GAC has considered the CCWG's proposal and supports Recommendations 1 to 10 and 12. However, there is no consensus on Recommendation 11 and the "carve-out" provision contained in Recommendations 1 and 2. As regards Recommendations 1 and 2, the GAC expresses its willingness to take part in the envisioned empowered community mechanism as a decisional participant, under conditions to be determined internally. While there are delegations that have expressed support for the proposal, there are other delegations that were not in a position to endorse the proposal as a whole. In spite of this difference of opinions, the GAC has no objection to the transmission of the proposal to the ICANN Board." Governmental Advisory Committee, "GAC Communiqué—Marrakech, Kingdom of Morocco," Marrakech, March 9, 2016, p. 4–5, <https://gacweb.icann.org/display/GACADV/GAC+Communiqués?preview=/28278854/41943976/GAC%20Morocco%2055%20Communiqué%20FINAL.pdf> (accessed May 20, 2016).

board and use its new authority in the EC to impede efforts by the community to block implementation of that advice if the board approves it.

Indisputably, the CCWG-Accountability proposal would grant the GAC powers that it did not previously have and increase government authority in ICANN versus the status quo. These changes were recommended even though some Members of Congress have explicitly opposed this outcome. Specifically, a 2014 letter from Senators John Thune (R-SD) and Marco Rubio (R-FL) made clear that from their perspective, government influence should not be expanded in the transition:

First, ICANN must prevent governments from exercising undue influence over Internet governance. In April we led 33 Senators in a letter to NTIA regarding the IANA transition. We wrote that “[r]eplacing NTIA’s role with another governmental organization would be disastrous and we would vigorously oppose such a plan. ICANN should reduce the chances of governments inappropriately inserting themselves into apolitical governance matters. Some ideas to accomplish this include: not permitting representatives of governments to sit on ICANN’s Board, limiting government participation to advisory roles, such as through the Government Advisory Committee, and amending ICANN’s bylaws to only allow receipt of GAC advice if that advice is proffered by consensus. *The IANA transition should not provide an opportunity for governments to increase their influence.*”<sup>33</sup>

A number of CCWG members and participants shared this concern about government increasing its power in ICANN post-transition, as did some representatives from ICANN stakeholder and constituency groups.<sup>34</sup> Yet this is precisely what will occur if the proposal is enacted as recommended.

- *An uncertain commitment to U.S. jurisdiction.* In the draft revised bylaws, the Post Transition IANA and the Empowered Community, respectively, would be “a California nonprofit public benefit corporation” and “a nonprofit association formed under the laws of the State of California.” There would also be several references to the California Corporations Code and a clause specifying that mediation for the IRP shall occur in Los Angeles. However, the bylaws never specify that ICANN itself must remain a California non-profit corporation. Article 24 states, “The principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America. ICANN may also have an additional office or offices within or outside the United States of America as it may from time to time establish.” There is an obvious difference between the location of a principal office and the jurisdiction of incorporations. In short, there is no bylaw restriction preventing ICANN from shifting its legal jurisdiction of incorporation to Australia, Belgium, China, Iran, Russia, Singapore, Switzerland, or anywhere else.
- Notably, even if the ICANN board thought that it needed to amend Article 24 to shift legal jurisdiction, that bylaw is a normal bylaw—not a fundamental bylaw—and could be changed by a two-thirds vote of the board. The EC could reject this amendment, but that would require significant opposition among decisional participants that is not evident from CCWG discussions. In fact, Annex 12 of the CCWG-Accountability report specifically includes among the topics of discussion for Work Stream 2: “Place and jurisdiction of incorporation and operations, including governance of internal affairs, tax system, human resources, etc.” and “Jurisdiction of places of physical presence.” These Work Stream 2 topics were included at the insistence of a number of members and participants who object to ICANN remaining a U.S. non-profit corporation. Worth noting is the fact that the resolution of the jurisdiction discussion in Work Stream 2 would almost certainly occur after the transition.<sup>35</sup>
- *An immature organization.* One of the hallmarks of an institution ready for additional responsibility is the facility with which it handles its existing obligations. Recent events raise questions about ICANN’s willingness to deal with

<sup>33</sup> Italics added. Senator John Thune and Senator Marco Rubio, letter to Dr. Stephen Crocker, Chairman, ICANN board of Directors, July 31, 2014, <https://www.icann.org/en/system/files/correspondence/thune-rubio-to-crocker-31jul14-en.pdf> (accessed March 15, 2016).

<sup>34</sup> See comments of Non-Commercial Stakeholders Group (NCSG) and Intellectual Property Constituency (IPC) councilors in ICANN/GNSO, “Transmittal of results of GNSO Council consideration of CCWG-Accountability Supplemental Final Proposal,” pp. 5–10.

<sup>35</sup> For a more detailed discussion, see Philip S. Corwin, “The Irritating Irresolution of ICANN Jurisdiction,” May 23, 2015, [http://www.circleid.com/posts/20160523\\_the\\_irritating\\_irresolution\\_of\\_icann\\_jurisdiction/](http://www.circleid.com/posts/20160523_the_irritating_irresolution_of_icann_jurisdiction/) (accessed May 23, 2015).

controversial matters. An instance of note was the decision to open a new gTLD: the .sucks domain. For obvious reasons, many intellectual property rights holders objected to creation of the domain—nobody at The Heritage Foundation, for example, is overjoyed at the prospect of a “heritagefoundation.sucks” domain.<sup>36</sup> When intellectual property rights holders complained to ICANN, however, rather than address the issue directly, ICANN ducked. It referred the question of whether .sucks was lawful to regulatory authorities in the United States (where ICANN is incorporated) and Canada (where the domain name owner of .sucks is incorporated) and asked them to adjudicate the matter. Both countries quite reasonably declined to offer their opinions on the matter.<sup>37</sup>

It does not engender great confidence in ICANN that, at the same time it is seeking greater independence from governmental authorities, it turns to those same authorities for assistance in resolving controversial matters within its remit. As the transition moves forward, ICANN will need to develop the institutional maturity to deal with controversies of this sort independently.

- *A community rarely able or willing to unite.* The CCWG-Accountability proposal and the revised bylaws are at the moment a theoretical product. There is a real prospect that the Empowered Community—which is at the core of fundamental accountability for ICANN—may be hamstrung by unanticipated and unintended consequences of the current structural proposals.

While there are serious concerns about the proposed accountability revisions themselves, there is an even more fundamental concern about whether the community can be decisive and united enough to utilize the accountability measures provided to the EC. The entire premise of the transition is that the multistakeholder ICANN community has sufficient maturity and cohesiveness to serve as a counterweight to the board and the enhanced influence of the GAC. The CCWG-Accountability development process engenders real doubts about the foundational suitability of the community as bedrock for accountability.

To exercise most powers requires the support of three or four of the five decisional participants. This will be very difficult to achieve even in the face of substantial cause. Because of their differing perspectives, if the matter at hand does not directly affect them, individual SO/ACs could be indifferent even when the ICANN board and staff are acting in a very objectionable manner. This is compounded by the GAC’s status as a decisional participant because the GAC is unlikely to be able to arrive at a common position in a timely manner if at all unless it changes its procedures to allow EC positions to be determined by less than a full consensus—a change that requires only a majority vote under the GAC’s operating procedures. Thus, GAC participation in the EC poses two potential challenges. First, if the GAC habitually finds itself unable to arrive at a decision, it would effectively increase the threshold for EC action by reducing the pool of potential decisional participants that could support or reject EC action from five to four. Alternatively, if the GAC changes its procedures to permit GAC decisions in the EC at less than full consensus, the U.S. could find itself frequently outvoted with the GAC supporting or opposing EC actions at odds with U.S. interests.

If the accountability measures are implemented properly, there will be avenues, such as the IRP and RFR processes, for righting ICANN missteps and forcing compliance with agreed procedures and rules without a decision from the Empowered Community. However, the most powerful accountability measures are exercised only by the Empowered Community and are premised on its being able to act in a decisive and dependable manner. Regrettably, the practical challenges of exercising its powers raise questions about the community’s ability or willingness to fulfill such a role.

## Conclusion

Nearly half of the world’s population, including almost everyone in the United States, uses the Internet for business or personal purposes and pursuits, and it has become a critical vehicle for research, discourse, and commerce. ICANN plays an important role in maintaining the safety, security, reliability, and openness of the Internet, and it is necessary that it remain accountable and transparent.

<sup>36</sup>To be clear, though not overjoyed at the prospect, this discomfort is a small price to pay to preserve the right of free speech.

<sup>37</sup>Chris Burt, “Canada Responds to ICANN on Controversial .SUCKS New gTLD,” *The Whir*, June 17, 2015, <http://www.thewhir.com/web-hosting-news/canada-responds-to-icann-on-controversial-sucks-new-gtld> (accessed March 15, 2016).

It is important to note that the proposed transition was not driven by problems or failings in the current IANA process or the U.S. role in that process. It was driven by political considerations. In my opinion, those political concerns are substantial and eventually will require the U.S. to end its historical relationship with ICANN. But that transition need not happen this September nor with this particular transition proposal. Indeed, NTIA and ICANN have repeatedly stated that it is better to get this transition done right than to get it done within a specific timeframe.

The proposed changes to ICANN provide numerous improvements and tools for enhanced accountability, but there are also uncertainties. The proposal is a blueprint for an accountable institution, but it is unclear whether the result will be sound or whether the ICANN community can or will act responsibly and in a timely manner to hold ICANN accountable.

In short, the adjustments in ICANN's structure and governance model are significant and untested. ICANN and Verisign are engaged in a 90 day "parallel testing" period of the new technical IANA process to make sure that, if the transition occurs, the new process will be reliable. Reportedly, Senator Rubio has requested that NTIA consider extending U.S. oversight role to provide for similar parallel testing of the new ICANN governance model.<sup>38</sup>

I agree that the U.S. should take steps to allow ICANN to operate under the new structure for a period of time to verify that unforeseen complications and problems do not arise while retaining the ability to reassert the historical NTIA relationship if unforeseen complications do arise. The ICANN board suggested such an approach in its public comment on the first CCWG report:

We believe the Sole Membership Model as proposed has the potential for changes in the balance of powers between stakeholder groups in ICANN's multi-stakeholder model. At any time, the balance of power and influence among any of the "groups" within ICANN can change based upon the willingness or ability to participate in the Sole Member, changing for example the balance between governments and the private sector and civil society. We believe that if the Sole Membership Model is the only proposed path forward, it may be prudent to delay the transition until the Sole Membership Model is in place and ICANN has demonstrated its experience operating the model and ensuring that the model works in a stable manner.<sup>39</sup>

The new ICANN similarly would implement changes in ICANN governance and shifts in the balance of power and influence among groups within ICANN. A soft extension of the current contract for a reasonable period of time would allow the community and ICANN to take the new mechanisms for a sustained test drive to verify to the Internet community that relies on ICANN that they are working as envisioned. This would not derail the progress made by the ICG or the CCWG because the ICANN board has confirmed that virtually all of the recommended changes, including the new accountability improvements and the EC, would be adopted and implemented whether the transition proceeds or not. It would therefore be prudent to maintain U.S. oversight, or at least a means for reasserting NTIA oversight, for the next two years until the new structure proves itself and the details of Work Stream 2 are fully developed and their implications understood.

—**Brett D. Schaefer** is Jay Kingham Fellow in International Regulatory Affairs in the Margaret Thatcher Center for Freedom, of the Kathryn and Shelby Cullom Davis Institute for National Security and Foreign Policy, at The Heritage Foundation.

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<sup>38</sup> Kieren McCarthy, "Republicans threaten to derail Internet transition: IANA contract getting unwelcome attention," *The Register*, May 19, 2016, [http://www.theregister.co.uk/2016/05/19/republicans\\_threaten\\_to\\_derail\\_internet\\_transition/](http://www.theregister.co.uk/2016/05/19/republicans_threaten_to_derail_internet_transition/) (accessed May 20, 2016).

<sup>39</sup> ICANN board, "ICANN Board submission of supplementary and final comments to the CCWG-Accountability 2nd Draft Proposal Public Comment forum: Summary of Board Input," September 11, 2015, <http://forum.icann.org/lists/comments-ccwg-accountability-03aug15/pdf/18SFyc7XR.pdf> (accessed May 20, 2016).

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The CHAIRMAN. Thank you, Mr. Schafer.  
 Mr. Sullivan?

**STATEMENT OF ANDREW SULLIVAN, CHAIR,  
 INTERNET ARCHITECTURE BOARD (IAB)**

Mr. SULLIVAN. Chairman Thune, members of the Committee, thank you for this opportunity to testify before you today on the topic of the IANA stewardship transition. My name is Andrew Sullivan, and I'm Chair of the Internet Architecture Board, or IAB.

The IAB is an organization that provides a long-range technical direction for Internet development. We donate our time in the interest of making the Internet better, and because we donate our time, we usually have an employer. Mine is Dyn. It is an Internet performance management company with its global headquarters in New Hampshire. But I'm not speaking on its behalf today.

Because of my two roles, my daily work relies on dependable IANA functions. Nearly 50 years ago, the United States government kicked off the project that led to the Internet. It trusted technical people to come up with a new communications medium that offered greater efficiencies, cheaper operation, and a reliable system made out of unreliable parts. The technical community delivered. Today, we have an almost magical technology that is a powerful engine of the U.S. economy, a technology on which much of the world relies and which is designed to minimize central points of failure and control.

The Internet only functions because all the independent networks that make it up cooperate voluntarily without central control or authority. This fact is why it is essentially impossible to take over the Internet and why it is so convenient, not necessary, but convenient to have people keep choosing to use the IANA registries. It makes interoperation among the various networks easier.

Today, the Internet community is on the cusp of eliminating needless involvement of the U.S. Government in IANA by operating this part of the Internet the way everything else on the Internet already operates, through private sector led cooperation. The proposal is complete, prepared. It has achieved consensus in the global Internet community. It is overdue, and now it needs to be implemented.

The NTIA's involvement in IANA causes two kinds of problems. First, it means that the normal evolution and operation of IANA has to work at government speed, not Internet speed. Second, it gives other countries the opportunity to blame the U.S. Government for problems it does not cause. There is a simple solution to



all of this. Let the community of IANA experts manage this function themselves. They know how to do it.

Despite what some people claim, the proposal doesn't really change that much, because every single change in the proposal, even every change to ICANN, ultimately relies on some system or organization that exists today, whether it be the Internet Engineering Task Force or the regional internet registries or the supporting organizations and advisory committees that ICANN already uses to make all its policy. We operational communities have enormous interest in making sure things will work after the transition, because we are the ones who will have to respond if we are wrong.

Some people seem to think the transition is happening in a rush. This is the slowest moving rush in history. Plans to get the U.S. Government out of this role have been around since 1998 when the founder of Facebook was 14 years old. There is simply no reason to wait or to do things in multiyear phases that appear only to be delaying tactics designed to create frustration in the community and thereby erode this consensus. Any phased approach wouldn't be a real test of the system anyway, so it would add delay and risk for no reward.

For businesses that depend on the Internet, such as my employer, Dyn, delay would threaten the functions we rely on to make our products and to provide jobs to our employees. Delay would signal to those who want to control the Internet that the U.S. Government does not believe the Internet really works as designed, and it would tell the global Internet community that its historic consensus around this proposal is meaningless.

We have a plan. It is a good one, and it meets the tests set out by the NTIA. It aligns responsibility with accountability, avoids the use of governmental authority when agreements among affected parties will serve the same purpose. There remains, of course, careful work to be completed in bringing the proposal to fruition, but my colleagues on the IAB and I remain completely engaged in the effort to see this through.

This is a tremendous chance for the United States to show the world its leadership in understanding that the Internet is robust and designed not to be captured, that even if other governments wish to control it or bend it to their will, the Internet is a system inherently resistant to those wishes. I urge you to lead us that way and show the world what tremendous ingenuity harnessed to voluntary cooperation can give to all of us.

Thank you for your kind consideration, and I look forward to any questions you have.

[The prepared statement of Mr. Sullivan follows:]

PREPARED STATEMENT OF ANDREW SULLIVAN, CHAIR,  
INTERNET ARCHITECTURE BOARD (IAB)

Chairman Thune, Ranking Member Nelson, and members of the Committee:

I thank you for the opportunity to testify before you on the topic of the transition of key Internet functions to the global Internet community. This is an important issue for the Internet, and I very much appreciate your thoughtful attention to the topic.

## 1. Introduction

My name is Andrew Sullivan. I am the Chair of the Internet Architecture Board (IAB). The IAB provides long-range technical direction for Internet development, ensuring the Internet continues to grow and evolve as a platform for global communication and innovation. We are chartered as both a committee of the Internet Engineering Task Force (IETF), and an advisory body of the Internet Society. There are 13 members of the IAB, all selected by the IETF community and each donating time in his or her individual capacity: we do not represent our employers or other groups. Because the IETF depends on our donated time, we normally have other employment, too. In my case, I work for Dyn, an Internet Performance Management company with its global headquarters in New Hampshire. Dyn's products and services depend on the global Domain Name System (DNS) and the global routing system: a destabilized Internet Assigned Numbers Authority (IANA) would be extremely bad for Dyn's business. Today, I offer you my personal views, which may not reflect the views of Dyn.

One of the tasks of the IAB is to act as the interface between the IETF and the rest of the world, and in that capacity the IAB oversees certain IANA registries. Because of this, I have been closely involved in the discussions about IANA's future since before the National Telecommunications and Information Administration's (NTIA) announcement of the transition in 2014.

I come to this topic primarily as someone whose daily work relies on dependable IANA functions. In my IETF and IAB work I have had countless interactions with IANA staff and the registries. In my Dyn work, my colleagues and I depend on IANA. I believe the IANA transition is about ensuring the health of the Internet.

In my view, the proposal to move the stewardship of the IANA functions to the Internet community is a good proposal, for three reasons. First, IANA's quite properly limited function works well for the Internet; but IANA is unfortunately less efficient than it could be because of the involvement of NTIA. Second, the transition makes limited changes that provide continuity with the way the system has been working at least since the founding of the Internet Corporation for Assigned Names and Numbers (ICANN). Finally, the proposal to make the transition is complete, and prepared, and has the support of the global Internet community; therefore, it needs to be implemented now.

## 2. Background on the Transition

In March of 2014, NTIA announced<sup>1</sup> its intention to move the stewardship of IANA to the Internet community. In accordance with NTIA's request, ICANN convened stakeholders with an interest in IANA's operation. The result was the formation of the IANA Stewardship Transition Coordination Group (ICG) in July of 2014. The ICG in turn asked the communities who regularly populate IANA registries—the operational communities—each to prepare a proposal about how to effect the transition for the relevant IANA registries.

Each operational community prepared its proposal, and they were assembled into a whole (and checked for coherence) by the ICG. Each operational community reported its consensus<sup>2</sup> and degree of support to the ICG. The ICG reported its unanimous support of the proposal in March of this year, and the ICANN Board transmitted the proposal to NTIA shortly thereafter. It is that proposal, along with an associated set of proposed accountability changes for ICANN, that NTIA is examining.

Before turning to the substance of the proposal, it is worth pausing and asking why the proposal was developed this way, with so many groups involved. The answer lies in the nature of IANA and the Internet.

One of the important ways that the Internet differs from other telecommunications technologies is in how much it depends on voluntary co-operation. The Internet is a network of networks (of networks, and so on), and each network operates more or less independently. The networks co-operate with one another, without a lot of central co-ordination, because it is in their independent interests to do so. In this way, the Internet is something like a market economy: people trade (goods in the economy, "packets" on the Internet) because they each get something out of it. In my view, it is the very alignment of each operator's interests with the out-

<sup>1</sup><https://www.ntia.doc.gov/press-release/2014/ntia-announces-intent-transition-key-internet-domain-name-functions>

<sup>2</sup>In the technical world, "consensus" does not have quite the meaning that it usually does in legislative contexts, but it is still very strong. When we say we have reached consensus, we mean that the objections have all been considered and either addressed or found not to override other considerations about the system. See for instance RFC 7282, available from <https://www.rfc-editor.org/rfc/rfc7282.txt>.

comes that has allowed the Internet to grow and flourish, such that it is a dominant communications technology of our time.

In a centrally-organized and centrally-operated system, controls over how people configure systems would be imposed by the center. Centrally-managed systems tend to be expensive or hard to operate (or both) when they get very large. But the Internet is distributed, because in a network of networks there *is* no center. In a distributed environment, it's often easier if one has clues about how to get started inter-operating with others. Those clues are the IANA registries. They fall into three broad categories, which I describe below.

To begin with, internetworking means that data (in the form of packets) are shared among independently-operated networks. To allow data packets to get from other networks to yours, it is necessary to be able to tell others what networks you are operating. To make that work, when you say, "I'm running this network," everyone else needs to know what "this network" means. The way we do that is to use a common set of numbers to represent the networks, and to use a common set of numbers it is convenient to maintain a starting-point list—a registry. IANA maintains the top-most of these number registries. IANA uses policies that work in tandem with the Regional Internet Registries (RIRs), who are directly responsible for managing the number resources in various geographic regions. Ultimately, when you connect to the Internet, you get an Internet Protocol address from your Internet Service Provider (ISP), who got their pool of addresses from an RIR, who originally got their share of the global pool from IANA. This distributed way of working ensures that there is not a single large bureaucracy in charge of all Internet addresses.

Second, to make it easy for the various networks to connect to and operate with one another predictably and reliably, they can use common mechanisms configured in a particular way. The mechanisms are called "protocols"—such as those the IETF creates. Protocols do not contain all the instructions for configuration, so, it is necessary to know how to configure a protocol for use on the Internet. For instance, when you go on the Internet and look at cat videos, your computer knows to show you a video as opposed to opening a spreadsheet because the cat video comes with a protocol parameter called "media type". It is convenient to have a single place to look up the configuration settings for these different protocols. Depending on who defines the protocol, the definition of the agreed-upon settings might come from different actors, but everyone writes them down in a shared place. That shared place comprises the protocol parameters registries; publishing them is another IANA job.

Third, names that are assigned on one network won't be any use to those connected to other networks unless the other network users know how to get to those names. It is no use to know that you want to reach "mail-server" without knowing whether it's the Senate's mail server, or your ISP's, or Dyn's. To know that, it is convenient to have a place to start looking for a name on the Internet. Mathematically, a way to do that (and one that is not too hard to implement in computers) is a tree structure, which by definition starts from a common root. We do this today in the DNS. Maintaining the registry of the common root (also known as the "root zone") is IANA's third job, which it does according to policies established by the multistakeholder processes in ICANN.

Note the emphasis above on how these arrangements are "convenient". We *could* make the Internet in a different way. People have designed and deployed systems that did away with some or all of the IANA registries, in favor of other approaches. But IANA is the system we have now, and the one that got the Internet this far. Note as well that the contents of these registries are specified by someone other than IANA. It is those communities of IANA users—the "operational communities"—who were involved in preparing the different parts of the ICG proposal.

One other point about IANA is critical to keep in mind: just like everything else on the Internet, use of it is voluntary. The Internet has no compliance department and there are no protocol police, because each constituent network that participates in the Internet is independent. On your network, you make your rules. Networks use IANA functions because those functions are useful. Of course, this also means that if they cease to be useful, or if the cost of relying on IANA is greater than the benefit it provides, people will find another way to operate their networks. You can only build the Internet with carrots: sticks do not work.

### 3. The Limited IANA Function Works Well

IANA's tasks are not policy functions; they are important, specialized functions, but they are not a locus of control of the Internet because the Internet by its nature is designed not to have such controls. The decisions about how these registries are to be populated belong with others. This division of responsibility works well, and the ICG proposal only serves to make that division clearer and more explicit.

Each operational community provides the contents of and policies for the registries with which it is concerned. The IETF is responsible for the protocol parameters registries it creates, and it is also the body that creates the protocols that use those registries. The RIRs are closely involved in number resource policy, and they are in turn responsible to their communities of members—the very people who depend on the numbers distributed by the RIRs. And finally, the root zone registry is maintained according to the multistakeholder processes that ICANN uses. Naturally, none of these processes (which are designed and operated by humans) is perfect. But they each have the conspicuous advantage that the technical interest in making the Internet work aligns with participation in ensuring that the registries perform their technical function. The Internet works well when the managers of resources feel the effects of their management decisions.

When requests come to it, IANA makes sure that the requests are well-formed, that requests conform with the policies for the registry, and so on. In this sense, IANA functions are narrow and limited in scope. This is not to suggest they are unimportant, but rather to state that the technical functions that IANA provides are specialized, and are not a source of control over the Internet.

The processes in question, and the communities involved in operating these processes with IANA, are mature and robust. We have been operating this way for more than 15 years, which is practically an eternity on the Internet. During that period, of course, various improvements and adjustments have happened; but the basic model has not changed very much.

There is one small current problem, and that is the ongoing involvement of the U.S. Department of Commerce through the NTIA. This is not to impugn the NTIA's staff, but instead to admit that its involvement at this stage is incongruous with how the Internet works. The reason it is problematic is that, unlike the operational communities involved in overseeing the different registries, NTIA is not itself primarily an operator of any Internet infrastructure; neither does it have any special expertise about the Internet that cannot be found among the operational communities.

There are two issues that result from the involvement of the NTIA. The first is that there is an extra party involved in all the IANA accountability arrangements, which means that the accountability is not as transparent as it ought to be. Worse, it sets up the U.S. Government as an impediment to the natural evolution of these key Internet functions, because changes to them invoke all the machinery of government bureaucracy before they can take effect. The arrangement forces IANA to work at government speed, not at Internet speed.

The second problem is that the presence of the U.S. Government in approving some IANA actions gives other countries the opportunity to blame the U.S. Government for problems that it does not cause. NTIA's approval function sometimes includes changes that directly affect country code top-level domains, and one sometimes hears claims that a response to an emergency on the Internet was held up by NTIA. This perception—even if it is unwarranted—potentially gives other countries an argument that IANA should be controlled by an intergovernmental body, as though a delay introduced by one government could be made shorter by adding all the other governments in the world to the task. The obvious answer, instead, is to let the people who need this service—the operational communities—manage it themselves. They are ready to do it, and have a proposal that has achieved global consensus on how to make that happen; so now is the time to make the transition.

#### **4. The Transition Proposal Brings Minimal Change**

One of the open secrets about the Internet is how little the people who actually operate networks and services like to change things. The first rule of being “on call” is to avoid getting called, so operators do not like to make changes unnecessarily.

Yet successful operators also know that maintenance is critical. In order not to have a large problem later, you must constantly remove unneeded code and functions that are no longer really necessary, but are there because they were always there. Systems that do not get good, regular maintenance are called “cruffy”, and they're just as ugly as that word sounds.

The proposal to move the stewardship of IANA to the Internet community is good, conservative maintenance. It eliminates a feature that is no longer really necessary, because the functionality is already provided in another, more efficient way. Also, the whole transition proposal was developed using the same inclusive, bottom-up mechanisms that daily bring us the Internet. The proposal aligns responsibility with accountability, and avoids the use of governmental authority when agreements among affected parties will serve the same purpose. It provides a practicable solution to a practical problem, and only makes changes where necessary to achieve the practical goal.

Consider the parts of the proposal. The IETF came together to develop the part of the proposal related to protocol parameters registries. It did this using the same mechanisms it uses for everything else: it chartered a working group in which anyone could participate (IANAPLAN). The working group proceeded as these groups always do—they work in public to create a document and determine what rough consensus emerges. The IETF achieved rough consensus on the IANAPLAN draft, so it became a part of the final proposal. The protocol parameters portion of the proposal changes so little in the IANA arrangements that the IETF decided to implement the proposal using ordinary supplemental agreements that the IETF and ICANN undertake approximately every year. This is in spite of the fact that the IETF makes far more use of IANA than any of the other operational communities, because there are thousands of protocol parameters registries and hundreds of changes processed every month. The IETF–IANA interaction works well.

To create the numbers portion of the proposal, the RIRs created the Consolidated RIR IANA Stewardship Proposal (“CRISP”) Team to create a single proposal approved by all the RIRs. This part of the proposal is little more than a contractual formalization of the arrangements that the RIRs already have with ICANN for operating of the numbers registries. The most significant innovation is the ability of the RIRs to change the IANA operator for numbers registries. But that innovation is hardly ground-breaking: it is just a standard relationship between a service provider and its customer. Accountability that depends on market mechanisms instead of governmental regulatory power has been effective in other parts of the Internet, so there is no reason to suppose it will not be successful in this case too. Indeed, this is the very sort of extremely successful relationship that the IETF has with IANA.

At first glance, it might appear that the names portion of the proposal changes a lot more than the other portions. It creates a number of new bodies, and depends on some fairly significant shifts in ICANN’s corporate accountability structures. The changes are, however, less radical than the first glance would suggest. There are three reasons for this.

First, because ICANN to date has contained both the policy function for names and the IANA function, it has not always been clear to people which function of ICANN was involved in any given discussion. So, the names proposal makes the distinction explicit, by creating a Post-Transition IANA (PTI) that will be used to contain the IANA functions. Making clear a line that was blurry is not radical, but is instead a hallmark of good system design. And this clarification is an improvement in the stability of IANA, because it protects IANA from being drawn into the policy discussions that ought properly to go on inside the ICANN multistakeholder community.

Second, while the accountability changes appear large, they actually depend entirely on the already-functioning advisory committees and supporting organizations that ICANN uses for all policy development. Past accountability relied on NTIA’s ability to enforce its contract with ICANN to regulate ICANN behavior. Under the new arrangements, that enforcement function lives with the community of people who are most affected. To perform that function they must have the necessary powers, and so the names proposal depends on the newly-empowered community. We already know what that community is like, because it comprises the very same structures that ICANN has relied upon for many years.<sup>3</sup>

Third, the names community proposal mimics the successful relationship between the IETF and IANA, and thereby ensures the operation of all the IANA registries along the same lines.

The overall effect is to provide continuity with the way that things have actually worked for many years, to align IANA stewardship with the way things happen on the Internet more generally, and to make changes only if they are rooted in already-operating structures and bodies.

## 5. It Is Time to Act

It might be tempting to think that the transition should not happen according to the current timeline, on the grounds that it is happening in a rush. If this is a rush, it is a slow-moving one. Since the original “White Paper” in 1998,<sup>4</sup> the plan has always been for the U.S. Government gradually to step out of this function, partly on

<sup>3</sup> The current arrangements have evolved over time, so it would not be correct to claim that the structures have been around for the lifetime of ICANN. Nevertheless, the basics of the current structure were mostly established by the early 2000s, and it is no exaggeration to say that the proposal is primarily relying on structures that are at least as old as Facebook or Twitter—practically geologic age on the Internet.

<sup>4</sup><https://www.ntia.doc.gov/files/ntia/publications/dnsdrft.txt>

the grounds that the users of the Internet knew better how to ensure the necessary accountability.

More recently, NTIA's announcement about this stage of IANA's evolution was fully two years ago. In the intervening time people from all over the world have debated and evaluated the various proposals and come to consensus. They have put in countless hours in reading and writing proposals, corresponding with one another, and attending meetings both virtually and in person. The proposals we have are developed and mature, and they are founded on mechanisms and bodies that have been tested for years.

Under the ICG proposal, IANA will mostly continue to work the way it always has, and the work will continue to be done by the same professionals who have been doing it. The main functional changes are the removal of a formal approval step by the U.S. Department of Commerce, and the elimination of a zero-cost contract let by the United States Government. Because of the process that led to the transition proposal, people all over the Internet have come to expect the final step in completing the work started in the era of the "White Paper"—a time when the World Wide Web was not even ten years old, and before Wikipedia had been established. The Internet has waited long enough. There is a proposal that has found consensus and that is workable. Now is the right time to proceed with this transition.

In an abundance of caution, some have suggested that the transition proceed in phases. It is not clear, however, how that would help anything. A phased deployment would not actually be a test of the eventual IANA arrangements. Instead, it would test a different set of arrangements every time a new phase started, and each phase would introduce a change (which necessarily brings some risk). So, a phased approach will not be a good indicator of how the eventual IANA structure would perform, and would introduce heretofore un contemplated risks. From a technical point of view, it would be safer and better-advised to proceed with the transition of the IANA all at once. In any case, a phased approach is transparently an attempt to create time to undermine the remarkable global consensus reached on this proposal. A consensus this broad will be frustrated and fragile when faced with delay, and such a delay would represent an attack on the global multistakeholder community.

For businesses that depend on the Internet, such as my employer Dyn, a delay now would send a terrible message. It would introduce uncertainty into the fate of the functions we rely on to make our products, to make our company grow and thrive, and to provide jobs for more than 400 people worldwide. More generally, a delay in the transition outside the process already underway would support the efforts of those aiming to cast doubts on the commitment of U.S. Government to carry through on the plan—first articulated in 1998—to transition out of its involvement in the IANA function, as well as the more recent request made by the NTIA to the Internet community to come up with a plan. It would signal to governments that want to control the Internet that the U.S. Government does not believe the Internet is resistant to those controls. Finally, it would undermine the multistakeholder processes that have been a foundation of the Internet's success, by telling the global Internet community that its historic, worldwide consensus around this proposal is meaningless.

## 6. Conclusion

The ICG's "Proposal to Transition the Stewardship of the Internet Assigned Numbers Authority (IANA) Functions from the U.S. Commerce Department's National Telecommunications and Information Administration (NTIA) to the Global Multistakeholder Community"<sup>5</sup> meets the tests set out by NTIA. The proposal is a practical way to allow the government to step out of a function it does not need to perform, and ensure that IANA continues with business as usual. A limited IANA works for the Internet now, and will continue to do so essentially unchanged in the future. While there are some inevitable changes proposed to enable the transition, they are all based on foundations that are both already working and in line with how the rest of the Internet already functions. The Internet has been waiting a long time for this step to be taken. Delaying brings no benefit and it might itself bring harm.

There remains, of course, careful work to be completed in bringing the proposal to fruition. But execution of a plan that requires months to complete is not improved by the addition of more time. It is, however, improved by the addition of more dedication to see the plan through to its faithful and complete end. Working with others across the Internet community, I believe that we shall together see that end.

<sup>5</sup><https://www.ianacg.org/icg-files/documents/IANA-transition-proposal-final.pdf>

Nearly 50 years ago, the United States Government kicked off the project that led to the Internet. It trusted technical people to come up with a new communications medium that offered greater efficiencies, cheaper operation, and a reliable system made out of unreliable parts. The technical community delivered, and today we have an almost magical technology that is a critical engine of the U.S. economy—a technology on which much of the world relies, and which is designed to minimize central points of control and failure. Today, the Internet community is offering to eliminate a needless involvement of the U.S. Government, and to operate this part of the Internet the way everything else on the Internet operates: by private-sector-led co-operation. This is a tremendous chance for the United States to show the world its leadership in understanding that the Internet is robust and designed not to be captured—that even if other governments wish to control it or bend it to their will, the Internet is a system inherently resistant to those wishes. I urge you to lead us that way, and show the world what tremendous ingenuity, harnessed through voluntary co-operation, can give us all.

My colleagues on the IAB and I remain fully engaged to ensure timely completion of this effort. I thank this Committee and its Members for your kind consideration.

The CHAIRMAN. Thank you, Mr. Sullivan.

Mr. DelBianco, your prepared testimony states that the power of governments will not be increased under the transition proposal, but Mr. Schafer's testimony states exactly the opposite, that government power is, and I quote, "significantly increased." So the question is for both of you. While you were both in the same room when this agreement was being negotiated, you have fundamentally opposing conclusions about the weight of government power in this proposal, and I'm interested in how you think senators ought to assess that.

Mr. DELBIANCO. Thank you, Chairman Thune. I'll go first. Brett from Heritage and I were both instrumental in drafting it, and there's a different interpretation of what we've done by empowering the community. When the U.S. created ICANN, we established a Governmental Advisory Committee as one of the formal committees of ICANN.

I mean, if I had to stand before you today and say, "Of all the stakeholders in the world, governments don't count at all"—you represent your states and your nation. You want governments to have a role at ICANN, and they have a role. But it need not be a special role. It's a multi-equal role, just alongside civil society, the engineering community, the business community that we represent, and as such, that community gets one of the votes among the community when it comes to deciding whether the community is going to challenge ICANN's Board's decisions, or they're going to block a budget, or actually spill the entire Board of Directors.

But when it comes to challenging decisions that arise from government advice, we drew the line. We said that government advice must only be adopted by governments within the absence of an objection. So the U.S. Government role can block government advice that violates our values.

Second, when the Board of ICANN acts on government advice, and the community wishes to challenge that advice, we can't allow governments to block our ability to challenge it. So we carve them out. We exclude the governments from having a vote, if what we're challenging is the Board's adoption of government advice.

On net, I think it's unquestionable that we have cabined off the government power, not increased it at all. And if you listen to the foreign governments, among them Brazil and Spain, and I gave you

the quote from France, the governments complain that they've been disadvantaged vis-à-vis the private sector in this transition.

The CHAIRMAN. Thank you, Mr. DelBianco.  
Mr. Schafer?

Mr. SCHAFFER. Thank you. Well, Steve answered the question. The governments will have powers that they currently do not have under the new ICANN structure. Currently, the role of governments is solely to be a member of the Government Advisory Committee that may provide advice to the Board. It has no votes. It has no power. It doesn't decide a budget. It doesn't decide to spill directors. It doesn't appoint directors.

Under this proposal, it will do all those things. It will have an equal vote with other parts of the community that it currently does not possess. And, furthermore, the safeguards that we put into the GAC carve-out—which I appreciate and I fought hard for in this transition to try and insert some protections—leave out carefully—nuances.

First, the decision over whether the GAC carve-out applies is dependent on the Board. The Board alone is empowered to decide—and I'll quote the new draft bylaws here—"whether it is determined that the GAC consensus advice was a material factor in the Board's adoption of the resolution." So the Board decides whether the GAC consensus advice actually fit into the resolution or not.

There's also no restriction on including the GAC advice in something broader in terms of the resolution, that the community very well might want more than it resists whatever that GAC advice it wants that otherwise might be objectionable. That combined sort of resolution is not prohibited under the current bylaws.

While the GAC consensus requirement applies to advice to the Board, it does not apply to GAC decisions within the Empowered Community. The U.S. might find itself very easily outnumbered in a vote in the GAC on a decision that the GAC raises inside the Empowered Community. The GAC's decisionmaking processes are guided by Operating Principle 47, which currently says that they're going to try and operate by consensus. But they can change that rule by a majority vote at any time they want to.

So, in short, governments have powers that they don't have currently. They have the ability to expand their use and their voice inside the Empowered Community, which they might not under the current consensus proposal, but they can change that, and the GAC and the Board itself can manipulate the process to determine whether GAC consensus advice is going to be applied in terms of the GAC carve-out. So it can be done and manipulated to the Board's pleasure for that purpose as well.

The CHAIRMAN. Mr. DelBianco and Ambassador Gross, both of you have extensive personal experience in the Internet governance space and both of you see value in the current transition proposal moving forward this year. Mr. Schafer has called for extending the IANA contract for an additional 2 years to help prove out the new ICANN structures, which, on its face, I have to say doesn't seem to be an unreasonable proposal.

So the question for either or both of you is: What is the harm in taking a little more time before finalizing the transition?



Mr. DELBIANCO. Mr. Chairman, as I indicated in my opening remarks, that sends the signal that the U.S. is not serious about the entire multistakeholder process that we charged with the mission of coming up with a transition proposal. Some of Heritage's ideas surfaced during the multistakeholder process of 2 years, and they failed to gather support. Some of Heritage's interpretations of government power were argued strenuously and very few agreed.

So I think what we would signal by a delay is an indication that we want to relitigate this, that certain elements want to change the proposal from what the community came up with, and that's a direct slap in the face of a community that has worked for 2 years on this proposal. Now, the effort of the community is of no consequence if the product of our work was not appropriate. And you have heard from all members of the community that support the notion of what we've come up with, that it strikes the right balance.

Let me also add that any delay could not be positioned as if it's a test drive. Think about that for a second. The powers the community has are extraordinary powers. We would only invoke the power to block a budget, block bylaws, or spill the Board if the Board acted in a completely inappropriate way. It could be a decade before we even exercise that muscle within ICANN. There's no test drive component involved.

In fact, there's no coverage provided by the United States that could be better than the coverage we have in California courts. What we've designed gives the community for the first time ever the power to go to court in California to force the Board to follow the community's consensus, to spill the Board, if that's our consensus, and to overturn a budget that the community doesn't support. That's the kind of backstop we need, and we have it in the California courts.

Ambassador GROSS. Thank you, Mr. Chairman, for that question. I think it's understandably confusing as to where the truth lies, because, clearly, there are many competing interests here. Having said that, based on my long now and painful sometimes experience in the international community on the issues about the role of governments and the like with regard to the Internet, I think the process going forward is clear.

If the U.S. Government steps in, as, clearly, they could, and seeks a delay of a year or two, it will be viewed as the role of government preempts the multistakeholder process, and it will be seen by the international community as proving that which many in Russia, China, and others have said to me and to many others, that this ought to be the province of governments, and the governments ought to decide these issues, not the multistakeholder community. I think that would be a tremendous failure for all of us, for all of us who have worked so hard to make sure that U.S. leadership focused on the importance of the multistakeholder environment and that the leadership there is used throughout the Internet community.

I look in terms of what the reaction of the international community after Marrakech when ICANN came forward with its proposal, and the reactions by governments was very clear. I think one of the market-based tests that we can use as to what the views of the

international community, in particular, the governments are is by what they say. They told many of us privately that they feel they got rolled, that the international governments got rolled on this, that they got boxed in and lost.

I don't think that's an unfair characteristic. I think the international multistakeholder community did, in fact, rise up and minimize the role the governments sought to play going forward in ICANN. And the very next month, Russia, China—the foreign ministers of Russia, China, and India issued a statement—the foreign ministers—saying that the need to internationalize the Internet governance and to enhance in this regard—the role of the ITU. So they are already moving past ICANN, recognizing it, and going to looking to the ITU for their approach for Internet governance.

The CHAIRMAN. Thank you, Mr. Gross.

Senator Schatz?

Senator SCHATZ. Thank you, Mr. Chairman.

Mr. DelBianco, I want to get some clarification on how the process would work in the case that the United States was, in Mr. Schafer's words, outnumbered on the GAC making a recommendation to ICANN. My understanding is that there's a mechanism to prevent that from mattering, essentially. But I want you to walk us through the process, because it was sort of a quick exchange and I want to make sure we totally understand what would happen if GAC—if there were a non-consensus recommendation made to ICANN that was determined not to be in the United States' best interest.

Mr. DELBIANCO. Thank you, Senator Schatz. One of the first things we did was to introduce a stress test to make sure that if the GAC were to change away from full consensus, there would be no obligation for ICANN's Board to try and find a mutually acceptable solution. Done. We fixed that.

So you're going into another case, which is let's suppose that the governments together decided they wanted to offer certain other kinds of advice that's non-consensus advice in a situation where the U.S. and its allies might be outnumbered. If that advice arrived in the form of a letter to ICANN's Board, the ICANN Board has no obligation, no special obligation at all, to consider or implement that advice.

But if it were to do so, the entire community is able to use the power to overturn Board implementation and Board actions that violate ICANN's bylaws, and therein lies the protection. As Mr. Beckerman explained, there are tight provisions limiting the mission of ICANN so that we can go after that.

Senator SCHATZ. Just to be clear, GAC is advisory in the first place. If GAC makes a recommendation—excuse me—if a faction within GAC makes a recommendation that is contrary to the United States' interests, ICANN doesn't have to do anything with it. If they did, and it was contrary to the bylaws, it would be overturned as a matter of interpretation of the bylaws. Is that correct?

Mr. DELBIANCO. Any party that felt aggrieved by the Board following that non-consensus advice can file an independent review process. That's invoking an independent review based on ICANN's bylaws and Articles of Incorporation. Oh, and by the way, the full community can also file an independent review.

Mr. Schafer likes to suggest that that community might be thwarted if the governments didn't want to go along, but we don't require unanimity. So if the governments alone didn't support the idea of challenging the Board's adoption of their own advice, they can't block it at all.

Senator SCHATZ. What about this assertion that there's the possibility for mischief or the manipulation of the process in the interpretation of the GAC advice, that the ICANN has to come to some sort of determination that the advice was arrived at in a certain way? Can you address that?

Mr. DELBIANCO. Yes, thank you very much. So if the Board received advice from the GAC and was acting on that advice, the Board has some leeway to interpret whether their action was based mostly on GAC advice or not. But this is neither here nor there. No matter what action the Board takes, whether it came to them in a dream or GAC advice, if they take action that's contrary to the bylaws, any aggrieved party, the business community, civil society, the technologists, or the entire community can come together and challenge that as against ICANN's bylaws and Articles. Therein lies the power we have never had before and that we'll be able to exercise in California courts. That's the safety belts that we're putting onto this engine.

Senator SCHATZ. Ambassador Gross, I have a question for you. There were a number of people—and I think this is a fair statement, that if there were a two-year delay, it would indicate a desire to relitigate this. But I want to go a little bit deeper. What is the practical impact of that on the Internet? I mean, we're talking in acronyms, right?

But for the public who wants to be assured that the Internet is growing, not just in the United States, but this network of networks continues to grow, and understanding for those of us who are watching this that there are some sort of incorrigible countries and there are some free countries and there are those in between that are making judgments sort of in real time about the extent to which they're going to be connected to the real Internet or essentially have a country-based intranet.

So what would be the practical impact of a two-year delay in terms of that decisionmaking and sort of our geopolitical negotiations?

Ambassador GROSS. Thank you. I think the clearest impact is not necessarily on the operations of ICANN itself, but rather on the broader global community. It will signal very, very clearly that the United States has changed its position, that the United States no longer believes firmly in a multistakeholder, private sector led Internet, but rather believes that the government and governments, therefore, play the primary role of making the final decision. Russia, China, and others will welcome such a decision.

Senator SCHATZ. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Schatz.

Senator Fischer?

**STATEMENT OF HON. DEB FISCHER,  
U.S. SENATOR FROM NEBRASKA**

Senator FISCHER. Thank you, Mr. Chairman.

Mr. DelBianco, if I understood you correctly in your previous comments and then earlier in your testimony, when you mentioned safety belts and when you talk about the community, was my interpretation of this correct in that the community can, in effect, dismiss or, in your terminology, spill the Board? Just a short answer.

Mr. DELBIANCO. Short answer is yes, Senator. Just like any corporation, the shareholders can spill the directors for doing the same thing.

Senator FISCHER. OK. So it seems like the community has quite a bit of power here. How does government fit in? Does government fit in your plan at all, or does the community have veto power over government?

Mr. DELBIANCO. Governments are one of the multistakeholders that the U.S. created when we designed ICANN, and they are one of them.

Senator FISCHER. But it doesn't have to be a unanimous decision? Did I hear that correctly?

Mr. DELBIANCO. It does not. We deliberately avoided unanimity so that no single entity could block a community decision.

Senator FISCHER. Including government?

Mr. DELBIANCO. Including governments. They cannot block any decisions that are supported by the rest of the community members.

Senator FISCHER. Mr. Schafer, what do you think of that? I've seen you kind of smile and nod through this conversation. So what do you think of that?

Mr. SCHAFER. Well, it's—in essence, the discussion that was just occurring before was apples and oranges. We were talking about expansion of government authority in the ICANN, and that is indisputably the case. Governments will have more power in the ICANN that is post-transition than is currently the case. They will have votes that they didn't have before. They will be able to make decisions that they weren't able to before. They will be non-purely advisory, which they are purely advisory now. So that was the discussion happening over there.

There was also a discussion about how the GAC carve-out would work, these protections against the GAC having two bites at the apple, being able to pose something to the Board and then going to the community and having a vote there on their own advice. And that also has a loophole, because it is up to the Board's discretion to determine whether the GAC advice materially affected or whether they came up with that on their own or whether they just would prefer to have the GAC be in a vote in the Empowered Community as well as being responsible for the resolution in the first place.

So those discussions are not necessarily the same as the safeguards and how the Empowered Community works. In the Empowered Community, the GAC has one vote among five. The way that the process works, you generally require at least three votes, sometimes four, to either block or to approve a decision that is being made within the parameters of the Empowered Community. So that's true. The GAC will have one vote among those.

But whether that's going to be readily available or effectively used by the community is hard to say. The community is a very fractious body. It very rarely comes to consensus on very many

things. The different parts of the organization, different parts of the community, have very specific focuses on the mandate and the topics that are going to be discussed in ICANN. Sometimes they may not have any equities whatsoever and may choose not to involve itself whatsoever, even though one party may be horribly abused by the Board decision. So that's part of that process.

So my whole proposal here is we need—yes, we're not going to be able to have everything tested out—

Senator FISCHER. But you'd make a little more time to see how this all tested out.

Mr. SCHAFER.—but in 2 years, we'd be able to have the community sort of stretch out, examine how the process is going to work, familiarize itself with it. And we should have more confidence in how it's going to work after that.

Senator FISCHER. I had a couple of other directions I wanted to go here, Ambassador Gross. As Mr. Schafer notes in his written testimony, today the United States does have the exclusive use of dot-mil and dot-gov, the domains, and I'm concerned about security risks that could result if this exclusive use cannot continue after the transition takes place.

So what, if anything, does NTIA or ICANN plan to do to address this issue? And if it's not addressed in the transition plan, how can we assume that these domains are going to be accounted for in the future?

Ambassador GROSS. I'm afraid, Senator, I would give you a very unsatisfactory answer, which is—

Senator FISCHER. Then make it short.

Ambassador GROSS.—I'm not sure. I'm afraid it has to be ICANN and NTIA that will have to answer those questions.

Senator FISCHER. Mr. DelBianco?

Mr. DELBIANCO. Thank you, Senator. On the question of dot-mil and dot-gov, I agree completely. Those entities, the Department of Defense and General Services Administration, need to have a permanent assurance that those top level domains are permanently under the control of the U.S. Government. That requires an agreement, a piece of paper, a contract, and if it doesn't exist today—and I'm told that it doesn't—then our DOD and our GSA should draw it up and ICANN will sign it. Those are the property of the U.S. Government, and they should never be at risk.

Senator FISCHER. Do we need to have this contract take place, signed and sealed, before we move ahead on this?

Mr. DELBIANCO. I would suggest to you if the Department of Defense feels they need more paper than they have, and if the General Services Administration thinks they need more paper than they have on gov, then I would completely support their desire to force ICANN to sign that up, and I am confident ICANN will do so.

Senator FISCHER. Well, it sounds like you and I agree that they need more paper, too. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Fischer.

Senator Ayotte?

**STATEMENT OF HON. KELLY AYOTTE,  
U.S. SENATOR FROM NEW HAMPSHIRE**

Senator AYOTTE. Thank you. Just to follow up on what Senator Fischer asked, Mr. DelBianco, is there something that's holding that back at the DOD end or any of the government agency ends in terms of thinking about the transition time coming up here relatively quickly?

Mr. DELBIANCO. Senator, I first brought this up over two years ago in two hearings on the same day over on the House side, and it's shown up in reports from this committee and letters that many of you have written. I am told that the General Services Administration and the Department of Defense are satisfied with the status quo, and yet if they believe they need more documentation, I know that ICANN would support it. But that's within our government. So I would ask you to direct those inquiries to the DOD and GSA, and we'll support whatever it is they think they need.

Senator AYOTTE. Well, this sounds to me like an important congressional oversight function, given the security functions of that site and what we need to do. We'll follow up on that, and it seems to me that we don't want to have problems there with their exclusive use in terms of the transition.

Mr. SULLIVAN, we really appreciate Dyn and how important the business is to New Hampshire. I wanted to ask you as you think about this transition, are there areas where you think that the deadline isn't going to be met, or do you think that everything is in line, that these deadlines can be met?

Mr. SULLIVAN. I think we can meet them. I fully admit that this is rough. I mean, it is—this is a tight time. But at the same time, I believe we can do it, because we're not changing that much, and we've already worked on this for all this time. So we know what we're doing. I believe we can complete it.

I'll just say one other thing just to follow up on the previous item. It's important to remember that those top level domains, mil and gov, are actually below the thing that is being transferred. So it's the root zone that is moving, not the domains underneath, and the DNS is designed, actually, to break those things up. So you can actually do those two pieces in different tracks, and it's not a problem.

Senator AYOTTE. I think it seems very doable. It's just that we need a plan, right, and we need to have it executed and we need that clear understanding going into it. Does that make sense?

Mr. SULLIVAN. Yes. But we have a plan. I mean, we're executing it right now. We're having regular meetings. Those of us who have to implement these things are busy doing it. In fact, from my point of view, the biggest distraction is that people keep saying, "Oh, well, they can go longer." No, no. You know, when you want to make a change on the Internet, you don't sort of hold it on forever. If you do an upgrade to your system, you don't let that take 2 years. You do it today, because a halfway upgraded system is actually broken.

Senator AYOTTE. My only point on the plan was just—we've seen this slow moving train coming, and some of the basic things in terms of the dot-gov and dot-mil—it seems like we should have that already shored up and resolved and make sure there's a clear

contract. That's something I hope we'll just make sure we get done, and we'll follow up with GSA and DOD on that.

But I did want to ask you: Are the ongoing stress tests sufficient to determine the reliability of the proposal's policies before we have the all-out transition?

Mr. SULLIVAN. You can't do a partial test of this. The key piece, of course, is taking out the U.S. Government oversight. So if you don't take that out, you haven't tested anything, and that's the reason that you can't do a sort of gradual test of this thing.

Senator AYOTTE. Or phased in.

Mr. SULLIVAN. You can't do it. If you do that, what you will do instead is just introduce delays that don't tell you what you need to know.

Senator AYOTTE. If you were in our position, and if you think about some of the issues that have been raised on the other side of this issue, what do you believe that members of Congress should be most focused on in reviewing this proposal to make sure that we end up where we want to be? I think we all share the same goals.

Mr. SULLIVAN. I think that a key thing to keep in mind is that this is a voluntary system. People do this because they chose it, and if you give them a choice and then take away the meaning of that choice by saying, "No, no, we're not going to do it the way you said," then they might make a different choice.

So the danger here is, in fact, that we could create a situation in which people don't want IANA anymore, and they want to do it some other way. That's possible. The Internet is designed that way. And that is at least as big a threat to the Internet as anything else that people could do. So from my point of view, it's critical to recognize and to support that the community has come together on this, we have consensus, and we know how to do this. So let's get it finished.

Senator AYOTTE. Thank you all for being here.

The CHAIRMAN. Thank you, Senator Ayotte.

Senator Gardner?

**STATEMENT OF HON. CORY GARDNER,  
U.S. SENATOR FROM COLORADO**

Senator GARDNER. Thank you, Mr. Chairman, and thank you to the panel for your testimony today.

Mr. Beckerman, it's always good to see alumni of the Energy and Commerce Committee make it over to the Senate, so it's good to see an Energy and Commerce staff do good. So thank you for being here today.

You say in your testimony the NTIA's oversight of IANA functions has always hidden the reality that it was the Internet community itself that was primarily responsible for keeping the Internet working around the world. And on the other hand, however, your statement also says that the failure to implement a successful IANA transition will serve to undermine the multistakeholder model, in turn, creating a risk to the economic, social, and cultural engine that we all agree must be protected.

So while we're having this debate, the question I have is: How is it that NTIA's current role is minimal or not primarily respon-

sible, as your testimony stated, for day to day operation of the Internet, yet also could be potentially destructive to the existence of the Internet as we know it? So maybe clarify the balance between those two. And do you believe the transition is largely a response to international perception and pressure, or is it something that we just need to do naturally?

Mr. BECKERMAN. Thank you, Senator. It's good to be here. I'd argue that the Internet has been one of the greatest engines for economic growth and freedom around the world, and that's what our members care about and our users care about and what we want to maintain. I think probably all the Senators on the Committee agree on that.

We think the best way to go forward with that and maintain that is to move forward with this transition, and we've talked a lot about some of the checks and balances that are in place. But we feel that if we keep the status quo under NTIA or the U.S. Government in some way, it will light the fire again under the ITU or other nations to try to change that model, and as a result, that would have a dire economic impact, we think, on the Internet. So that's why we want to see this go forward.

Senator GARDNER. Some nations' governments have instituted countrywide Internet access blackouts, including nations like Iraq, the Democratic Republic of the Congo, and perhaps most known to everybody here, North Korea as well. In your testimony, you talk about some countries that, quote, "believe that something as powerful as the Internet needs to be tamed by government or in some cases fragmented so that networks stop at national borders." You further note that if they have it their way, the global and open Internet as we know it will cease to exist.

So do you think that the most recent IANA transition will send this—the proposal that we've been talking about today sends a strong enough message to bad actors around the globe like Russia that the United States will not tolerate governments limiting, terminating, or otherwise restricting public access to the Internet? If so, why do you think—to the people who may believe that you haven't done such a good job, how would you argue to them?

Mr. BECKERMAN. Thank you, Senator. That's a great question. You know, part of the system that we have, as has been noted, is that it only operates now under consensus, meaning that everybody agrees that this is how it operates. We obviously have limited powers, generally, on how countries want to operate within their borders. But the best thing that we can do is be the example for the world and let the multistakeholder community, who has the greatest stake in the future of an open Internet, take the reins here and show that out in the global community.

Senator GARDNER. Mr. DelBianco, in your testimony, you argue that retaining NTIA's unique role increases the risk of Internet fragmentation and government overreach. Do you think the risk has developed or increased over time? And if you believe it has increased over time, what specific events or decisions do you think were most responsible for that, and how has the role that NTIA has played changed over that time?

Mr. DELBIANCO. In the years, Senator, since we transitioned ICANN toward privatization and independence, the U.S. Commerce



Department has taken a very light-touch role. So over time, it was diminishing, this notion that the U.S. had a special and unique power. And then it came more to a head, in the wake of the Snowden revelations, that the U.S. control might have some implications there.

Now, all of us in this room know that the domain name system has nothing at all to do with government surveillance. But it doesn't matter. Politics are what they are. That led to the pressure on moving ahead with the planned privatization, the last remaining legacy arrangement that we had, which was the oversight of the IANA contract. So now the pressure shows up on that.

We are in a position now to replace the U.S. light-touch oversight with heavy oversight by the community. It's an excellent bargain for the community of Internet stakeholders. And yet if we were to delay this transition—any kind of a significant delay, as Ambassador Gross has said many times—that refocuses the world that, hey, there really must be something special about the role that NTIA holds with IANA. In fact, it must be so special that it ought to be run by the United Nations. We end up creating that entire spectacle again and increasing the pressure that we have been in the middle of diminishing.

Senator GARDNER. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Gardner.

Senator Daines?

**STATEMENT OF HON. STEVE DAINES,  
U.S. SENATOR FROM MONTANA**

Senator DAINES. Thank you, Mr. Chairman. We've heard today that a successful transition means maintaining an Internet free from government control, and that an Internet tamed by government is bad for Internet users and for the overall global economy. This government-involved model that we are trying to avoid sounds a bit like the FCC's Net Neutrality Rules.

Mr. Schafer, are the FCC's Net Neutrality Rules consistent with the light-touch oversight regime that everyone seems to agree is essential to maintaining freedom on the Internet?

Mr. SCHAFER. Thank you, Senator. I'm afraid I'm going to have to beg off on that question, because I don't do Net Neutrality for the Heritage Foundation. So I don't feel like I'm the person to answer that question for us.

Senator DAINES. Do we have somebody who would like to swing the bat at that ball?

Mr. DELBIANCO. Senator, I'm also not an expert on FCC. But when you think about neutrality being the control of traffic, we've really got to acknowledge that, as Mr. Beckerman said, governments control the conduct and content of what happens within their borders, whether it's over the air or on the Internet. And when they do that, we have to lead by example and claim that it's wrong, that it disadvantages their citizens to get lousy information, that their businesses can't reach customers out here, and we can't sell things to them.

But I don't think that the parallel would work here, because ICANN can do nothing to influence the content censorship that

happens within a country's borders. ICANN has nothing to do with that, on purpose.

Senator DAINES. Let me pivot over on this issue of small business representation. The business community and constituency that help advise the ICANN Board is made up of companies like Amazon, AT&T, Facebook, Google, Microsoft—great companies.

But, Mr. Gross, what about small businesses? The constituency claims to do outreach to small enterprises. But are the interests of small businesses truly represented in this model?

Ambassador GROSS. I think it actually clearly is, and I can give you some examples. Not only are all of us involved in this process very sensitive to that, because we all recognize that the growth and innovation of the Internet by and large is driven by small entrepreneurial organizations and that the economic impact on an economy is driven by SMEs, but Mr. Sullivan is a good example of what we're talking about.

Many of the technical people that are very, very deeply involved in this process work for small companies, small technology companies, and are acutely aware of the impact that this has on them.

Senator DAINES. Well, I appreciate that, because I was part of a small technology company for a number of years that became a large technology company.

We've also heard about the possibility of Internet fragmentation, the governments breaking off, perhaps creating their own systems, if this transition were not to go through. When I was at Right Now Technologies, we had customers in Canada, Australia, Germany, Japan. Our product was available in 33 different languages. We had 17 offices around the world. So I saw that firsthand.

Mr. Beckerman, could you talk about the implications of a fragmented Internet on your member companies that have global businesses?

Mr. BECKERMAN. Thank you, Senator, and your point is a good one. A fragmentation is terrible, probably even worse for the small and medium sized business, but for larger companies as well. The Internet has grown and has created this great innovation and growth of the economy because it is not fragmented, because data can flow throughout borders, and it is one system.

So anything that blocks that will be bad for, I think, the global economy, generally, particularly as the Internet is taking a larger role in creating economic growth. But it would be devastating, I believe, for the smaller companies.

Senator DAINES. The issue of the dot-mil and dot-gov domains was brought up earlier. We've got exclusive use—and I say, we, being the United States' exclusive use of dot-mil and dot-gov. It's unclear whether the U.S. will keep exclusive use after the transition. Despite years of work on the transition proposal, today, we still don't have any clear information on how this matter would be addressed.

Mr. Schafer, could you talk about the security risks involved in allowing other governments or the private sector to use dot-mil or dot-gov domains?

Mr. SCHAFER. Well, absolutely. We've preserved our exclusive use of those because we don't want third actors to come in there where our military has sensitive information and our government has

sensitive information. We want to be able to preserve our unique and sole use of those domains going forward and we want to make sure that doesn't happen.

The only way to do that is to enter into a sole contract with ICANN assuring that the U.S. will have exclusive use of that in perpetuity. We have informal arrangements right now. I think we should formalize them, and that's the only way to resolve that.

I have some other thoughts on other questions you've asked, but I'll reserve—

Senator DAINES. Thank you. That's a good answer to the question. I think it's helpful.

Last, for Mr. Sullivan, we've heard today about how the NTIA's current oversight role is bureaucratic and moves at the speed of government, not at the speed of the Internet. But the transition proposal before us is 210 pages long. ICANN's bylaws are 216 pages long, and the ICANN Board is advised by half a dozen advisory committees, each with sub-constituencies. With all of these accountability layers in place, are we really achieving a less bureaucratic process?

Mr. SULLIVAN. Yes, we are. Thank you. The reason that there is an issue is because there is a wheel in the system right now that does no work. The approval of NTIA happens after all of the other checks have already taken place. So I have been directly involved, not that long ago, in a change to the root zone that was a response to a denial of service attack on the Internet. This happened to be an attack on the top level domain of the country, Turkey.

That attack—we were able to mitigate it by adding some additional name servers to the network. But the problem was we had to go through the approval of NTIA. Now, some people involved in that thought that NTIA made it slow, and other people think that it didn't make it slow. And from my point of view, it doesn't matter, because all of the technical work had already been done. There was no reason to do this.

That's the kind of problem that I see with the continued involvement of the NTIA. It's just not doing any work. You should get rid of features that you don't need in your code. They're just bugs waiting to happen.

Senator DAINES. Thank you, and thanks for that thoughtful reply today, too, as well. I appreciate it.

The CHAIRMAN. Thank you, Senator Daines.

Senator McCaskill?

**STATEMENT OF HON. CLAIRE McCASKILL,  
U.S. SENATOR FROM MISSOURI**

Senator McCASKILL. Mr. Schafer, this is to you or Mr. Manning. In 2012, Marco Rubio and I sponsored a resolution that said, and I quote, "The consistent unequivocal policy of the United States is to promote a global Internet free from government control and preserve and advance the successful multistakeholder model that governs the Internet today." That passed unanimously in both the House and the Senate, which is, frankly, astounding that anything would pass unanimously in both the House and the Senate.

So what has changed in the last three and a half years to justify forcing the Commerce Department to continue in the current role?

Mr. MANNING. First of all, I appreciate the question. Sitting here with the various esteemed experts who have been talking reminds me a little bit of when I went to Belfast and I spent some time in a shipyard there and watched the shipyard where the Titanic was launched, and all the experts said it would work, and it did until it got halfway through the North Atlantic. And we all know what happened.

But in terms of your direct question, in 2012, the Obama Administration also put an RFP out on whether ICANN should hold, should continue to be the contractor, the vendor, to oversee these functions. So in that exact timeframe that you're talking about, the Obama Administration was so frustrated with the actions of ICANN and the lack of accountability that they actually went to the step of putting out an RFP to try to get their attention so they would be accountable. That's one of the things that's happened.

It's proven that when the Federal Government has the capacity to say "Wait a second. You're not doing what you're supposed to be doing" to ICANN, ICANN reacts. When ICANN is acting as an independent operator, then they will have no accountability to you or to Mr. Rubio or to anyone else who sits in this committee room, only to the Executive Branch.

Senator MCCASKILL. I get your point. But let me ask the panelists who are working on this transition: Wouldn't a two-year extension just kind of make China and Russia point to our delay as a rationale to exert more control and build support for moving the governance to the U.N.? I mean, aren't we going to create exactly the atmosphere by continuing to delay that is going to end up causing much more damage than the frustration we have with the accountability of an organization that's not directly under government control?

Mr. DELBIANCO. Senator, I would agree completely. That is the risk that we've identified here today, because we have spent a generation explaining that the U.S. has a light-touch oversight with an intention to transition and privatize. And now at the final hour after the community unanimously supports the proposal, we're going to say, "Never mind." Others want another bite at the apple. Somebody wants to revise it. That will send a signal that, really, I guess the U.S. Government's unique role is quite important, that the U.S. has no intention of giving it up, and that's a signal that the U.N. should resume its efforts to step into the shoes that we stand in today.

Senator MCCASKILL. So let me ask you this. Let's assume that we move forward with the transition. I'm a little worried about the accountability of ICANN. I agree with the witnesses that have talked about that. Is there a mechanism in the plan for third-party audits? Who's going to be a third-party arbiter over their finances and other—you know, who's going to make sure that there's transparency? Who besides the Board?

Mr. SCHAFER. There is not one automatically in place. The community can request one. It has been given the power to request one.

Senator MCCASKILL. Shouldn't there be a requirement that there be a third-party audit?

Mr. DELBIANCO. There is a financial audit every year by a third party.

Mr. SCHAFER. I'm talking about a third-party audit of ICANN that can be decided by the Empowered Community, and it has been empowered to do that. But I agree with you that the transparency is important.

In terms of the multistakeholder model, you asked earlier, you know, do we want to just toss it aside. No, I don't think so. I've said it before, and I said it in my opening statement, and I said it in my written testimony that I'm in favor of the transition.

But I think we need to proceed cautiously because the Internet is important. And we have proceeded—Andrew said it's the slowest car crash in history, but it has actually been a very, very difficult and jam-packed two years to put this proposal together. We have worked extreme hours and in extremely tight timelines, and we've done extreme edits to the bylaws. They are twice the size that they used to be.

And proceeding now, I think we should make sure that we have appropriate time to assess how the process is going to work in real time, not these stress tests, which, while I think are valuable, are not real world exercises. See how it works in the real world, and then we can move on to the transition. I think that we should do that. But I think we need to verify and vet to make sure that we're not making irreversible decisions before moving forward.

In terms of the government control of the Internet, I agree with the resolution that passed unanimously. I think that we should move to a multistakeholder model, but I think we also need to make sure that we understand exactly what we're proposing. And the equities and principles that are established by NTIA are not necessarily those that are established by Congress.

The letter by Senator Thune and Senator Rubio in 2014 contains the phrase that they thought that the IANA transition should not provide an opportunity for governments to increase their influence. So exactly where is that line about where governments should be in ICANN and what should be acceptable in this transition to NTIA but also to Congress, and those may not be the same thing. Thank you.

Senator McCASKILL. I'm out time. If the Chairman allows you to go, Mr. DelBianco—I know you wanted to say something.

The CHAIRMAN. Yes, please go ahead.

Mr. DELBIANCO. Thank you. You asked about annual audits of accountability. So here's the good news. In June—I'm sorry—in February of last year, this committee really quizzed Secretary Strickling and ICANN's CEO over whether ICANN would live by the Affirmation of Commitments once the IANA contract was over. We took good note of that, and stress test 14 specifically looked at what happens if ICANN walks away from the Affirmation of Commitments, because in that affirmation is the only place where we can require ICANN to do annual reports of transparency and accountability and every 5 years, a community-led review of accountability and transparency, where we have the ability to inspect documents that are inside of ICANN.

So the good news is that we have baked all of those commitments on accountability into the bylaws. ICANN cannot walk away from

them anymore, and that's in specific response to a concern that this committee raised last February.

Senator McCASKILL. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator McCaskill.

Senator Johnson?

**STATEMENT OF HON. RON JOHNSON,  
U.S. SENATOR FROM WISCONSIN**

Senator JOHNSON. Thank you, Mr. Chairman, first of all, for holding this hearing. This is really an interesting discussion. I appreciate really all the testimony, and this all sounds so reasonable. We have all these acronyms for all these different organizations. You know, I come from a manufacturing background, so I've solved an awful lot of problems. There are two well-known sayings that, certainly, are my guiding principles. The first one is "If it ain't broke, don't fix it," and, secondly, "All change is not progress, all movement is not forward."

So I want to first go to Mr. Schafer. You said you're not opposed to this transition. Define what's broken. What's broken? Why do we need to transition?

Mr. SCHAFFER. As I mentioned in my opening remarks, the main impetus for this transition is political. The system is not broken. The process is working smoothly. The actual IANA function process is working well. It has facilitated the growth of the Internet over the past three decades, and since ICANN was established in 1998, that process has worked smoothly and well.

So it's a political dynamic whether it's going to move forward or not. I disagree strongly with Mr. DelBianco and Mr. Gross that this will send a signal that we don't have faith in the multistakeholder community.

I think that we are just showing prudent caution to make sure that what the multistakeholder community is approving works well and works the way that they think it's going to work before we let go and loosen the U.S. ability to actually back up that community and demand that the Board implement changes. The Board has resisted things over and over and over again.

And in terms of the other countries, our decision over this transition is not going to affect one iota China, Russia, or other countries' decisions on their own domestic policies or whether they're going to pursue their own censorship or constraints on the Internet in the United Nations, or to try and pressure ICANN itself through the GAC or bilaterally or other means, whatever they have available. This agenda is important to them. They're going to pursue it regardless of our decision.

Senator JOHNSON. Mr. DelBianco, in answer to one of the questions, you basically agreed that this was about politics. Pressure has been building because of Edward Snowden. Is this really just about politics and pressure? Where has America not been a good steward of the Internet? I mean, look at the phenomenal progress that's been made under our stewardship. Why do we want to give that up? Why would the world community want us to give that up?

Mr. DELBIANCO. Excellent question, Senator. I would suggest that part of what happened with Snowden affected only the timing.

That created the impetus in 2014 to take a hard look. But you said if it ain't broke, don't fix it. But if there's something broken in the road ahead, you would definitely pay attention.

And think about it. The IANA contract would end at the end of 2018. The U.S. Government at that point would have to confront the specter of telling the rest of the world, "We're going to renew the contract. We're going to continue to hold the reins." So sooner or later, Senator, we would have absolutely faced the specter of telling all the other governments in the U.N. we're never going to give up control.

Senator JOHNSON. I like preventative measures, no doubt about it. But, again, let me go back to—can you point to something that's actually broken right now, other than the political perception that something is amiss?

Mr. DELBIANCO. Senator, I will. If we allowed this contract to just go on until it expires in 2018, the U.S. would face a broken system, because the U.S. would have to stand in front of the world and say, "We really never intended to transition ICANN to privatization." What we have done here is accelerated that timeframe, because the contract itself had a short expiration in 2015. We extended it.

Senator JOHNSON. And so we're assuming something in the future might be broken, but you can't point to anything in the past that's broken.

Mr. Manning, do you want to try to answer this?

Mr. MANNING. Well, you know, anybody who has ever put in an operating system into their computer knows you really don't want to be a first mover. You want to allow the beta testers to figure it out. And it seems to me that what we're doing with this accelerated time-frame is we're really putting ourselves in a position of beta testing this whole multistakeholder system that's been developed. I recognize that with the backstop of having government oversight over ICANN—it isn't a full and complete test.

However, I think it's foolish to move forward with a system that's being crammed together in short order by a lot of really smart people with best intentions and not—with the real stewardship responsibilities we have, not make certain that at least the blocking and tackling is done right before we turn full control over of this system to—

Senator JOHNSON. By the way, we have extended this contract four times, correct? Did a disaster occur? And, by the way, I have seen multiple times something far less complex, things like material resource planning systems in companies, just be an unmitigated disaster. So that's, again, why I kind of adhere to "All change is not progress, all movement is not forward."

Mr. Sullivan, you wanted to chime in on this one?

Mr. SULLIVAN. I have been involved in cases where there was, in fact, a failure, because this is an additional step. There's this additional approval step, and it's unnecessary, and what it does is slow down responses, emergency responses on the Internet to real operational problems. I do DNS for a living, and we see those things slow stuff down. So that's an example of something that is broken today because of the need of the U.S. Government to be involved.

The additional thing is that these are voluntary systems. They are systems that people choose to use. The community of people on the Internet could go away and do something else with this. There are systems, for instance, that have been designed to avoid the IANA registries, and we could encourage that sort of thing even further if we delay on this. So there are immediate threats and there are actual practical cases.

Senator JOHNSON. OK. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Johnson.

Senator Rubio?

**STATEMENT OF HON. MARCO RUBIO,  
U.S. SENATOR FROM FLORIDA**

Senator RUBIO. Thank you. I think we can all begin by an agreement that up to this point, this process has worked well for the world. The U.S. innovated the Internet, and our management of it has led to its enormous explosion. I want to say that one of the reasons why the world should be grateful that America innovated it is because we have a concept in this country of free speech that doesn't exist in many other democracies, vibrant democracies in this world where the concept of free speech does not exist.

So that has governed the way in which the Internet has developed here and around the world, and for better or for worse, there's a lot of free speech on the Internet, as we're all aware. So up to this point, it has worked well.

I understand the argument. I really do. The world has grown up, and now they're saying, "OK, we've now grown up. We've now reached capacity, and so we want to have a greater stake through non-governmental entities in the future of the Internet. America should no longer singularly control it. We thank you for innovating it and bringing it forth. We thank you for your years of management, but we want a greater stake in what is now a global common."

I don't dispute that or dismiss it offhand. What I do dismiss, however, is this notion that if we somehow don't do it on this accelerated timeframe, then the world is going to rebel and say, "Oh, we knew you were lying to us the whole time. You never intend to give this up," and that somehow this is going to give an excuse, for example, to China or Russia to argue to the world, "That's why we need our own Internet regulatory framework apart from the United States because this stuff doesn't work anymore."

And the reason why is because I think irrespective of what we do, China is going to move forward. I have here, for example, from NTIA, dated May 16, 2016, and it writes, "In March 2016, China's minister of industry and information technology issued draft measures that would require all Internet domain names in China to be registered through government licensed service providers that have established a domestic presence in the country and would impose additional stringent regulations on the provision of domain services."

It goes on to say, "These regulations would contravene policies that have been established already at the global level by all Internet stakeholders, including the Chinese." So my view and my pre-



diction is that I don't care how fast this moves or what we do, China is going to try to take over, at least as much as they can, the Internet, because it's a threat to their government control of their society.

There's an article somewhere today—I only read the headline. I didn't get a chance to read the body of the article. But it said that one of the unfortunate things that's happened in China is it proves that Internet control works. It's one of the first things these regimes try to do, and, of course, China will try to use its growing economy as a leverage point on the world: If you want to sell to the Chinese people, then you're going to have to register domains under our system that we've created. So I think that's going to happen anyway.

I think the point and what I intend to communicate here in a letter here that I hope my colleagues will join me on is that before any plan can be implemented, we ensure that changes in the transition proposal are applied, that they operate as envisioned, and that they don't contain unforeseen problems that could undermine the multistakeholder model or that threaten the openness, security, stability, the resiliency of the Internet.

So I plan to communicate this formally to the administration in a letter later today, and I welcome any of my colleagues on this committee to join me in making sure that we're not the ones who get this wrong, that we're not the ones on the wrong side of history, who, because of international pressure, because of these arbitrary deadlines, we proceed hastily to give up one of the greatest promoters of democracy and free commerce in the history of the world, the free and open Internet.

I honestly don't believe that proceeding cautiously on this is to our detriment, and I think that's fully understandable, given the scope of what we're talking about here. And I would say also that while we still control the process and the timeline, once we move past a certain point, there is no leverage to pull back. If this thing goes off the rails, if, in fact, it's used in a nefarious way, what leverage do we have to pull back on it?

Mr. Schafer, I'll ask you: What would be the consequences if we didn't do a soft transition? What would be the consequences of not doing a soft transition by allowing, for example, the NTIA contract to expire in three months?

Mr. SCHAFFER. We would be pursuing what you just outlined, which is a risky course of action. We think we know what this proposal is going to do. We think we know how the Empowered Community is going to work. We think we know how ICANN is going to respond to governments and to the Empowered Community. But we do not know that.

If we go forward with this transition—which the Board has promised to implement all of the accountability measures, the vast majority of the recommendations in the bylaw changes already—regardless of whether the transition proceeds on time or not, if we do that, it allows us to vet and actually explore this proposal and make sure that it's operating the way we think it's going to. I think that is a prudent course of action, to proceed cautiously and to go forward on a sort of test drive of this new process and make sure that it is operating effectively and as we think it's going to.

Senator RUBIO. On the open questions, Mr. DelBianco, I would ask—I think you spoke about this earlier. The revised bylaws for the ICANN Board that they're currently reviewing seem to send a mixed message in terms of future jurisdiction. Particularly, the revised bylaws do not include a fundamental bylaw that would solidify ICANN's locus as in L.A. County or the U.S., generally, which the U.S. Chamber of Commerce and others have sought since the transition's announcement in 2014.

Furthermore, the 2009 Affirmation of Commitments includes a provision that ICANN remain headquartered in the U.S., but that commitment is not enshrined in the revised bylaws. On the other hand, the revised bylaws are rooted in California non-profit law and include a provision that the principal office of ICANN remain in L.A. County.

So what assurances do we have that can be provided that ICANN will remain headquartered, not just maintain a principal office, in the U.S., considering these deficiencies as it currently stands?

Mr. DELBIANCO. Thank you, Senator. I'm not a lawyer. I'm a tech entrepreneur and a businessman. But lawyers tell me that the principal office for the transaction of business is the term they use for headquarters, and that is in the bylaws. It's in Article 18, that the principal office for the transaction of business of ICANN shall—not is or may be—but shall be in Los Angeles. That's in the bylaws. If ICANN attempted to change that bylaw, the community itself could block that change.

But that's not enough. I said belts and suspenders in my opening remarks. The suspenders part is in the Articles of Incorporation, where Section 3 says ICANN is organized under California non-profit public benefit corporation law. And for ICANN to try to change the Articles of Incorporation would require a 75 percent support from the Empowered Community.

So ICANN will have a U.S. presence, a legal presence and a headquarters presence, unless the vast majority of the whole Internet community decides at some point that they don't want it to have that. Now, none of that would interfere with your ability to protect American citizens and businesses from whatever ICANN would ever do, because jurisdiction flows any time that an entity like ICANN is affecting the interests of Americans. It really doesn't matter at that point on the U.S. jurisdiction.

Senator, you talk about this notion of an accelerated timeline, so I took the liberty of displaying a board, which I created about a year and a half ago for hearings in the House, to show the timeline on this transition. So it's 2 years long, and it has multiple tracks, the accountability part, Andrew Sullivan's technology part, and a tremendous role for the U.S. Congress and administration as well as civil society. So we've had plenty of opportunities to work our way in to this multi-hundred-page document, but you can't test the document.

Almost everything we're doing in our new bylaws affects how the community reacts when things go wrong, when there's a disagreement with ICANN's Board, you see, because every day, ICANN will get up and put their pants on and do business the same way they

always have. We can't test extreme emergency measures such as we've built over any period of a few months or even a few years.

So the notion of a delay—I'll close quickly. I'm using your time and I'm very sorry about that. But the notion of a delay simply sends the signal that the U.S. believes that the role we hold is so valuable we're not giving it up, and we've reiterated to China, Russia, and the United Nations that they want to step into those shoes, and that's the biggest danger of a delay.

Senator RUBIO. Yes, and I would just say, look, I can't speak for anybody else. Maybe others never want to give it up, OK? I'm telling you from my perspective and my engagement on this issue, it's not about not giving it up at some point. It is about whether we do it the right way, because it's an irreversible decision in many, many ways, and it comes in light of increased authoritarian measures around the world in places like Russia, in places like China, over the Internet.

I just read to you this statement put out by NTIA that shows that we are having this debate in the context of an increasingly authoritarian environment when it comes to oversight of the Internet, where China has done a successful job of building a great firewall, where today, you know, people in China do not have, for example, access to images from Tiananmen Square. It is filtered out.

So there are real concerns about the environment that we operate in when some of the largest global players are authoritarian regimes who have shown the propensity and the willingness to exercise control over the Internet and also, by the way, in the context of what's happening geopolitically in the South China Sea, as an example, where China is a signatory to the Law of the Sea Treaty, and yet they are taking over illegitimate territorial claims that they're exercising, building artificial islands, claiming territory that doesn't belong to them, and basically ignoring the mechanisms by which all of that is supposed to be regulated. If they do that for islands, why would they not do it for the Internet, one of the most powerful tools in human history?

So it's not that I don't want it to happen. I just think it has to happen in the right way in the right timing, or we can't get it back. We can't reverse those mistakes.

Mr. DELBIANCO. Senator, let me add that you're exactly right. The actions that these regimes take to block their citizens' access is fragmenting the Internet, and it is a bad thing. It is exhibit number one for why we don't want to allow them to elevate that to a United Nations level control over the Internet itself. China is going to censor content of its own citizens and businesses, and there's not a thing that ICANN can do about that at all. Nothing ICANN can do will ever affect that.

Instead, we need to make sure that ICANN is insulated and doesn't present a target for China, Russia, and other nations to elevate that censorship through the U.N. into where they now can impose that at the top level of the Internet. See, it's one thing for them to block the content of a YouTube video in Turkey if it offends the sensibilities of a president. But what if they could use that to block the entire *YouTube.com* domain from the entire Web.

Do you see what I'm saying? We can't allow that censorship to creep to the core. The best we can do is recognize the nations will censor at the edge of the Internet.

The CHAIRMAN. Thank you, Senator Rubio.  
Senator Sullivan and then Senator Klobuchar.

**STATEMENT OF HON. DAN SULLIVAN,  
U.S. SENATOR FROM ALASKA**

Senator SULLIVAN. Thank you, Mr. Chairman.

Gentlemen, thank you for your testimony. I think, you see the bipartisan concern that we have here on this issue. There's a backdrop to some of the concern, and that's watching an administration for 8 years who has undertaken negotiations with some of the adversaries that we're talking about—Iran, the Iran nuclear deal, even what's going on in Syria with Russia—where despite being told that these negotiations are in the best interest of the United States, a lot of us think that what we've gotten has not been in the best interest of the United States and other realms.

But that is a backdrop here, because there's a sense of "here we go again"—an administration that sometimes thinks our actions in the international realm have harmed the world's interest or doing something we might regret. So let me ask a question. What was the reason, again, for the idea for NTIA's transfer? And how does this advance America's interests? Two very simple questions.

I'll start with you, Ambassador Gross, just on that question. How does this advance the interests of the United States?

Ambassador GROSS. Thank you very much, Senator. As you well know, because you helped lead the U.S. interests just a few years ago during the World Summit, the issue of ensuring the independence of ICANN from governmental control is of paramount importance, and we have been, for the entire time, successful in keeping that from happening.

Senator SULLIVAN. So let me just—Mr. DelBianco, you insinuated that if we allow the transfer to go forward, the actions at the United Nations, the actions at the ITU, will somehow lessen by Russia, by China, by—but Mr. Schafer, you said that this is only going to whet their appetite. Isn't the action ultimately going to be at the ITU and the U.N. with regard to what China and Russia are doing to try and continue control over the Internet?

Does anyone on this panel believe that they're not going to continue regardless of the transfer to try to get more control over the content and governance of the Internet? Does anyone believe that that's not going to continue to happen?

Mr. DELBIANCO. It will continue, Senator, but we will take away their target. The target of nations that want to assert control is to step into the shoes that the U.S. has uniquely filled since we created ICANN. Because we are the unique, sole nation controlling the IANA contract, that becomes the target that they want to take.

Senator SULLIVAN. But you're not saying that we allow this transition to go forward and they're going to be good to go on Internet control and control over the content.

Mr. DELBIANCO. Within their own borders, we know that nothing about this transition is going to affect what China does to suppress what its citizens see and what its businesses can do.

Senator SULLIVAN. But I'm also talking internationally. Isn't it a concern to you—that all of you share—that they're going to continue—and when I say, they're, I'm talking about authoritarian governments who want more control over the Internet. Aren't they going to continue with their campaign at the United Nations, at the ITU?

Ambassador Gross, you've done a great job of thwarting that in your career at the State Department. But isn't that going to continue? Isn't that where the action is, to be honest, if we're worried about Internet control in terms of authoritarian regimes?

Ambassador GROSS. Indeed. In fact, I would say that that is going to be it, and the question here is what impact the decisions here on the IANA transition will have there. In answer partly to your question about the timing, part of the timing has been that in 2012, there was a thing called the WCIT, which was a treaty conference at the ITU that many of the countries that are authoritarian and otherwise wanted to explicitly extend the jurisdiction of the ITU to include Internet-related issues. There was a split, and we were—we never signed that treaty, thank God. But we were also on the minority there.

Senator SULLIVAN. And is that one—does every nation who is a member of the ITU get an equal vote?

Ambassador GROSS. Correct.

Senator SULLIVAN. So we are——

Ambassador GROSS. We are one of 183, I think is that number.

Senator SULLIVAN. Well, that's a challenge.

Ambassador GROSS. Indeed. So here, the key is do we want to give ammunition to those who seek to extend the ITU's role in this space by saying that governments ought to decide after all the work that's been done by the multistakeholder community with regard to the IANA transition? Do we want to give them a talking point for which we will have a hard time rebutting——

Senator SULLIVAN. Well, let me just interrupt you.

Mr. Schafer, you seem to think the opposite. You thought that this would whet the appetite for more action in these international fora like the U.N. and ITU. And if that's the case, or if all of you believe that these authoritarian regimes are going to continue their activities in those international fora for more control over the Internet, what should we be doing in the Congress once this issue is either behind us or delayed? And I think it's a healthy debate to have, but what should we be doing as a Congress to give our negotiators, our administration, our allies more authority to thwart the attempts at Internet control in these international fora, which, to me, seems like where the real action is.

Mr. Schafer?

Mr. SCHAFER. Senator, I agree. I think that what's going on with the ICANN transition, whether the U.S. allows the transition to proceed or whether it doesn't proceed, is not going to change the motives. It's not going to change the efforts of countries that want to go to the ITU and use it to sort of intrude over Internet governance internationally. They're going to try to do that anyway, regardless of what happens with this transition. Therefore, I kind of regard it as a separate matter. I'm more interested in making sure that this ICANN transition process, if we're going to proceed down

this path, is actually well done and is exactly what we're envisioning.

And then we need to battle on this other front, because whatever they're trying to do or will intend to do in the ITU is not going to be affected by the U.S. continuation of its oversight role or the transition being implemented. That is a battle that is going to have to be fought there. The decision to proceed on the transition and announce it was a short-term political effort by this administration to blunt that effort. It's not a solution to that problem. We're going to have to continue to do that.

And, therefore, I think that those who think that we're going to announce the ICANN transition, and this is somehow going to magically appease the governments that want to have a greater say over the Internet governance—it's just wrongheaded. It's not going to resolve that problem. I think you put your finger on a very big issue, and we need to see them separately, but we should not delude ourselves and fool ourselves into thinking that this transition is somehow going to resolve that other problem.

Senator SULLIVAN. Well, Mr. Chairman, just a final comment. If any of the panelists have suggestions for the record that they would like to submit to give us more ammo—and I say, us, our negotiators at the U.N. and the ITU—to prevent that kind of takeover and how the Senate can help in that regard—because that is going to be a continuing battle. We would welcome those suggestions as part of this hearing. Thank you.

The CHAIRMAN. Thank you, Senator Sullivan.

Senator Blumenthal has returned. He's up next, and then Senator Klobuchar.

**STATEMENT OF HON. RICHARD BLUMENTHAL,  
U.S. SENATOR FROM CONNECTICUT**

Senator BLUMENTHAL. Thanks, Mr. Chairman, and thank you all for being here on a very important, complex, and sometimes confusing topic.

Last year, as you know, the FCC established the Open Internet Order to protect and promote the open Internet in the United States. The global Internet should similarly be free and open, and to that end, the United States has a responsibility to lead by example. That's the most effective leadership there is. That is to remove any perception, real or imaginary, that the U.S. Government is somehow controlling the Internet.

Now that the multistakeholder community has approved an IANA transition plan for approval, I think it's important that the U.S. Government avoid any actions that may send the wrong message to the international community regarding its support of an open Internet. There may be certain risks associated with any delay of the IANA transition or calling for a vote in Congress on that transition.

So my question to you, Mr. Sullivan, is: what role does the Internet have in promoting free speech and human rights? And how do we best secure and open an free Internet, not only at home, but around the world?

Mr. SULLIVAN. Thank you, Senator. First, I should say I am not a politician or a human rights lawyer or anything like that. I make

bits flow on the wires. From that point of view, my view is that the Internet encourages the expansion of those rights by its nature because it is voluntary, because it is designed to work only if you and I want to exchange things, we exchange them between us.

So the whole design of the system encourages that kind of operation because it's not possible to go and talk to, you know, the person who is in charge of this. Instead, you have to encourage people to interact of themselves. So from my point of view, that is actually what encourages the rights development, both domestically and internationally.

Senator BLUMENTHAL. If Congress were to call for a vote on the IANA transition, what message would it send to foreign governments, do you think?

Mr. SULLIVAN. Well, I think it would send to foreign governments the suggestion that the United States doesn't really believe that the community is ready to do this. But I don't think it's just foreign governments that I'm worried about. I'm worried about this message being sent to the operators of all of the networks all over the world.

The United States said it was going to get out of this, and it told people to come up with a plan, and we did come up with a plan. We've worked on it for all this time. We've worked on it for many years. We've been ready to do this for a long time, and it's working.

So if what happens now is somebody comes along and says, "Well, we didn't really mean it," then everybody is going to look at that and say, "Well, why should I participate in this voluntary association when the people who are involved don't hold up their end of the bargain?" I'm really worried about that. I think that would be destabilizing. It would be bad for the Internet. It would be bad for all the businesses that depend on it. But it's a real risk because that's the way the Internet is designed.

Senator BLUMENTHAL. And bad for human rights?

Mr. SULLIVAN. For sure. I mean, if you undermine the Internet, and you undermine the functioning of it, and you undermine the way that it works, and you undermine the trust between people, then the Internet will function less well. It will take time for people to come up with these alternatives, and they'll be competing alternatives, and we will see various kinds of fragmentation.

I think it'll come back together because the interests are always in—you know, on the end of the network for me to exchange with other people. That's what I want to do. So it's natural that it will gradually converge. But we have a system that's working now. We don't need to undertake all of that work.

Senator BLUMENTHAL. Does anyone on the panel disagree with that point?

[No verbal response.]

Senator BLUMENTHAL. Let me ask you, Mr. Beckerman, if I may, if we fail to move forward with transitioning stewardship and transitioning over key Internet domain functions within a reasonable timeframe, what's the risk that we lose our chance to preserve the multistakeholder model, of Internet governance, that the ITU and other intergovernmental organizations may wrest control, take control?

Mr. BECKERMAN. Thank you, Senator, and I appreciate the comments you make about the role that the United States has to play in a leadership role with the Internet and the role the Internet has played for democracy and free speech and human rights around the world. It's incredibly important, and that's why there is a lot at stake in this transition.

I think if the United States sends the wrong signal going through this process, there will be ramifications for multistakeholder processes well beyond this. And, certainly, as we've talked about this morning, it does light a fire under the ITU and others to take the reins, and the only thing that's really holding this particular system together at the moment is the consensus. And if there's not faith that the United States is negotiating in good faith and that we're putting our trust in the multistakeholder community in this process, I think the results could be unfortunate.

Senator BLUMENTHAL. Thank you.

Thanks, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Blumenthal.

Senator Klobuchar?

**STATEMENT OF HON. AMY KLOBUCHAR,  
U.S. SENATOR FROM MINNESOTA**

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. Senator Schatz was going to put these on the record, and he asked me to do it. First is an open letter supporting the transition from 17 Internet companies and trade associations, including the Internet Association and U.S. Chamber of Commerce. And the second is a letter from a group of seven civil society and public interest groups supporting the transition.

The CHAIRMAN. Without objection.

Senator KLOBUCHAR. Thank you.

[The information referred to follows:]



## An Open Letter to Congress from U.S. Business

Dear Members of Congress:

The Internet is the greatest platform for innovation the world has ever known, and the greatest communication network yet devised. Our companies depend upon its stable and secure future.

The Internet's addressing system helps keep the Internet global, scalable and interoperable. An important proposal to assure the continuing security, stability and resiliency of this system has recently been approved by the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN) and delivered to the U.S. government.

In March 2014, the U.S. Department of Commerce announced a plan to transition its historical stewardship of the Internet's addressing system to the global Internet community. This plan represents the final stage of the development of ICANN, as a private-sector led, multi-stakeholder organization to coordinate Internet addresses. At the time of their announcement, the Commerce Department asked ICANN to convene the global community of Internet stakeholders to produce a transition proposal.

Our companies and trade associations are proud and active members of this community. We have worked with representatives from civil society, government, and the technical community to craft a proposal that enables the U.S. Government to seamlessly transfer stewardship of the Internet's addressing system to its global stakeholders.

The proposal delivered last month meets the criteria set out by the Commerce Department two years ago. Furthermore, it includes significant and concrete measures to enhance ICANN's accountability to its global community. We recognize that additional important work remains, including properly revising ICANN's bylaws and further improving ICANN's practices and procedures. It is imperative that this work be accomplished in a timely and effective manner and we look forward to ensuring that it does.

The Internet is defined by its inclusivity and openness. Those critical characteristics are reflected in the work that -- over the course of many months of open, transparent and inclusive discussion -- went into the drafting of this transition proposal.

We congratulate those who worked tirelessly to develop the proposal and we celebrate the effort that will enshrine America's commitment to ensuring the future of a global, interoperable and stable global Internet.



*May 23, 2016*

## CIVIL SOCIETY STATEMENT OF SUPPORT FOR IANA TRANSITION

**Introduction**

We the undersigned U.S. and international civil society and public interest groups support and encourage the timely transition of the Internet Assigned Numbers Authority (IANA) functions to the multistakeholder community, as outlined in the Internet community's proposal submitted to National Telecommunications and Information Administration (NTIA) on March 10, 2016.

Civil society has been involved in and following the IANA transition since NTIA's announcement in March 2014 in which the agency communicated the intention to "transition key Internet domain name functions to the global multistakeholder community." Members of our community have been involved in both the Working Group (WG) on stewardship transition and the WG on enhancing ICANN accountability. Representatives from civil society have participated throughout, contributing substantially on a range of issues from the structuring of the posttransition IANA; to working to ensuring the continued stability, continuity, and resiliency of the DNS; to bringing about a commitment that ICANN will recognize and meet its human rights obligations going forward.

When the Internet community came together in Marrakech in March 2016 to endorse and forward the IANA transition package to NTIA, there was consensus that the product of two years of challenging hard work was robust and credible and met the key NTIA criteria. The undersigned civil society and public interest groups believe that the IANA transition is a positive development for the Domain Name System and for the Internet at large, and that the process to develop the transition proposal has been a successful expression of multistakeholder approaches to Internet decisionmaking.

**The transition is important**

The Internet has been instrumental in promoting civil liberties and universal human rights, a goal shared by the United States government. As a global platform for the free flow of information, the Internet has facilitated unprecedented expansion of free expression and freedom of assembly & association. Simply put, the Internet has become an indispensable vehicle for the exercise of human rights around the world. The continued functionality of the open, interoperable, global Internet is a top priority shared by our organizations because it is essential to protection of human rights in the 21st century. Our organizations depend upon the stable and secure operation of the Internet to do our work every day, as do the human rights defenders, journalists, and other civil society groups we work with around the world.

Many of the undersigned organizations have worked with ICANN's staff and community on the structure of the transition and are committed to continue holding ICANN accountable to its human rights obligations after the transition. We believe that the multistakeholder model and governance structure of ICANN is the best way to empower global civil society along with the technical and business communities who have an interest in the free and open global Internet. We believe that supporting the participation in ICANN of a diverse international multistakeholder community that shares a common interest in openness and innovation is the most robust long term strategy for preventing any governments or other multilateral entities they may commandeer from steering the DNS in a direction that would be much less supportive of a free and open global Internet. Further, we see this proposal as an effective path to continue stable and resilient DNS administration that supports the interests of public and private stakeholders across societies and industries.

For those reasons, we strongly support the plan to transition oversight of the IANA functions to the global multistakeholder community. The IANA functions, which include management of Internet number resources and the DNS, help keep the Internet global, scalable and interoperable. We believe that executing upon the IANA transition is the best way to ensure the continued functionality of the global Internet and to protect the free flow of information so essential to human rights protection.

**Delaying or blocking the transition is not in the interest of stakeholders**

The transition of these functions away from the U.S. Government removes an excuse for authoritarian countries to demand greater oversight and regulation of Internet issues. Any delay in the transfer of these management functions to the global multistakeholder community could have the effect of undermining the open-

ness and interoperability that has characterized the Internet to date. This is because the open, interoperable, global Internet did not arise out of agreements between governments, but rather through community-led innovative approaches by a diversity of stakeholders. In many ways, this transition is returning the Internet and DNS to the open multistakeholder governance model that characterized and fostered its first few decades of growth.

Failure to move ahead with the IANA transition will empower those who advocate for governments alone to manage or regulate the Internet, without equal involvement of the private sector or civil society. Delay will encourage those who favor a governmental, intergovernmental, or solely multilateral model of Internet governance, whether implemented through the United Nations' International Telecommunication Union (ITU) or some other government-dominated, non-multistakeholder body.

Yet, the importance of the transition to realizing human rights and the empowerment of Internet users around the globe does not seem to be shared by all. We read with concern the mischaracterizations of the IANA transition plan's proposed human rights commitment for ICANN in the May 19 letter from Senators Cruz, Lankford, and Lee to U.S. Department of Commerce Secretary Pritzker and Assistant Secretary for Communications and Information Strickling. While we share the Senators' stated desire to protect Internet freedom, we note that their proposed solution of delaying the IANA transition will unintentionally have exactly the effect they hope to avoid: Delay would incur risk of increasing the role for foreign governments over the Internet and undermine free speech. The suggestion in the letter that the commitment that is sought of ICANN to respect its human rights obligations "would open the door to the regulation of content" is frankly puzzling and clearly incompatible with the further defined and limited ICANN mission in the transition plan.

The consequence of failure to move ahead with this transition will be to reinforce the power and influence of those who would prefer a less open, less innovative, less global Internet platform. We believe this could have significant implications for human rights worldwide, as well as undermine U.S. interests and values. We strongly believe that the best way forward is to support a strong and accountable multistakeholder system that enables civil society groups, business, and technical community members from all over the world to participate in ICANN independently of their governments.

### Conclusion

It is the view of the undersigned civil society organizations that the IANA transition will confirm the legitimacy of multistakeholder approaches to Internet policy and governance, will result in a stronger and more empowered community within ICANN and ensure that the Internet community and not ICANN or one government is responsible and accountable for the stability, security and resiliency of the Internet going forward. This multistakeholder transition both protects the Internet and best serves stakeholder interests. Blocking or delaying the transition would strengthen the hand of those who do not believe in or support an open Internet and would encourage further government intervention and control.

Signed,

Access Now  
Article19  
Centre for Democracy & Technology  
Human Rights Watch  
Open Technology Institute  
Public Knowledge  
Ranking Digital Rights (Rebecca MacKinnon)

Senator KLOBUCHAR. Ambassador Gross, at our last hearing on this topic, I asked you about the accountability working group, and you testified that accountability is incredibly important. What aspects of the accountability proposal give you and the companies you represent confidence that ICANN will remain accountable after the transition?

Ambassador GROSS. Thank you very much, and I appreciate your remembering our discussion about this a year or so ago.

There was tremendous focus on that very issue over the past year or so, and thanks to the hard work by many people, some of whom are at this table, not including myself, the processes that

have been often referred to as being very complex and lengthy are designed to ensure exactly what you're talking about, to make sure that all the voices are heard and that the organization is truly accountable in a proactive fashion.

I would note that there's new leadership at ICANN. In fact, I think yesterday there was a new CEO who just began, someone who I know and respect and I think will bring tremendous fresh insights into the way in which ICANN will be operating. So I feel very confident that the processes will, in fact, ensure that ICANN is accountable, not just to individual parts of the Internet community, but to the entire Internet community.

Senator KLOBUCHAR. Very good.

Mr. DelBianco, at our last hearing on the IANA transition, I asked Fadi Chehadé, who is the former CEO of ICANN, about the process for stress testing in advance of the transition. He testified that many of the tests were developed based on the criteria already set out for transition, and I understand you led the working group that applied the stress tests to the accountability proposal. Do you want to comment on that and whether the proposal satisfies the criteria?

Mr. DELBIANCO. Thank you, Senator Klobuchar. A few of the stress tests were suggested by the hearing that you held last February, such as the accountability agreements that were in place or whether ICANN would change its principal place of business to avoid a U.S. jurisdiction. Those are just two of the 37 stress tests that we eventually analyzed.

The community working group examined today's ICANN versus the proposed ICANN and concluded that without a doubt the new accountability mechanisms gave us the ability to hold that organization accountable far better than the current system we have today.

Senator KLOBUCHAR. Thank you.

Mr. Sullivan, Senator Ayotte and I worked closely with ICANN to address concerns about the expansion of top level domain names in the system that goes back years. At our last hearing on the IANA transition, we heard about how ICANN was able to address potential risks to consumers, businesses, and law enforcement during the expansion. In your testimony, you emphasized that the new accountability procedures are built on ICANN's existing structures.

Do you think the experience of implementing the top level domain expansion will help ICANN address new policy challenges that emerge after the transition? Just comment generally about this top level domain name issue.

Mr. SULLIVAN. Thank you. First of all, I think that it has been helpful. But there's a second piece of this transition that I want to emphasize in this context, and that is, historically, there has been a little bit of confusion about ICANN's role here, because it did two things. It did the IANA registry, which is the simple operation of just writing the things down and publishing them on the Internet, and it did the policy functions about the domain names at the top level.

What this transition does is it makes really crystal clear that these are different functions and they're in separate places and it puts them separately. So it ceases the confusion that I sometimes

notice. It's as though people have confused, you know, the Department of Motor Vehicles, where you register your car, and this committee.

You know, there are the policy questions, and they're important. And then there is the simple writing things down, and this transition actually makes that much clearer. So it protects this technical function from all of those policy discussions, which are important and they need to go on, and they will need to go on in the future. But you keep these things separate, and that makes for a much safer system overall.

Senator KLOBUCHAR. OK. Does anyone else want to comment on that, the domain names?

[No verbal response.]

Senator KLOBUCHAR. All right. Thank you very much.

The CHAIRMAN. Thank you, Senator Klobuchar.

Senator Markey?

**STATEMENT OF HON. EDWARD MARKEY,  
U.S. SENATOR FROM MASSACHUSETTS**

Senator MARKEY. Thank you, Mr. Chairman, very much.

Good to see you again, Mr. Beckerman. I remember you well from being the Republican counsel on the Energy and Commerce Committee for all of these issues.

You know, it's, to me, the most important innovative technology of our lifetimes. And when a kid from Holliston, Massachusetts, can come up with an idea like Instagram and then sell it to a dropout from Harvard for a billion dollars, you know there's a good thing going here on the Internet, and we don't want to jeopardize it. We want to protect it.

There are so many telecommunications giants, combined with the Chamber of Commerce, combined with human rights organizations that have supported the domain name transition. From your perspective, Mr. Beckerman, how will the transition benefit American businesses?

Mr. BECKERMAN. Thank you, Senator. It's good to see you as well. I think part of the reason why this transition is important and is an improvement over the status quo is that, directly to your point, it's giving the interests that have the most at stake, businesses large and small, medium sized businesses, technologists, civil society, and even Internet users, the stake that they need to make sure that the system continues and that we can have future Instagrams and future Facebooks and everything else around the world and not have other interests take over and block the innovation that you've seen so closely there in Massachusetts.

Senator MARKEY. Thank you.

Mr. DelBianco, how does it help the business community?

Mr. DELBIANCO. Two ways. The business community under the new bylaws can participate in challenging Board decisions against a tightly constrained set of bylaws. We've never had the ability to do a community-based challenge that we could enforce in the courts.

Second is that it's not so much about sending a message or appeasement or sending a signal as much as it is about removing the target. By the U.S. obliterating the role of one government holding

the IANA contract, that ceases to become the thing that the U.N. covets to take over.

Senator MARKEY. Ambassador Gross, we know that an alternative to the multistakeholder model are plans proposed by a number of countries, including China and Russia, who are suggesting measures that strike at the core of what makes the Internet great. Can you provide us with some specific examples of what Russia and China are proposing as an alternative to the structure that we're discussing today?

Ambassador GROSS. Yes. Thank you very much, Senator. Those countries—and I would say with Russia in the lead here on this particular issue—would seek to enhance the role of the U.N. and, in particular, the ITU to be the primary place for the discussion and resolution of Internet-related issues and to regulate aspects of the Internet.

I would note that right after—as I mentioned earlier, right after the Marrakech meeting of ICANN, when all of this came together, not more than a month later, the foreign ministers of Russia, China, and India met in Moscow and issued a communiqué, and they said explicitly that the need to internationalize Internet governance and to enhance in this regard the role of the International Telecommunications Union. Based on my experience, I believe foreign ministers when they tell me that they're going to do something I don't like.

Senator MARKEY. And why would that not be as good, putting it at the ITU as opposed to under the framework which we're discussing today?

Ambassador GROSS. There are many reasons, but at the core, it is that the ITU, which is an incredibly important organization for the United States and for the world, is a multilateral organization, not a multistakeholder organization. It does not give the same rights to the technical community, to civil society, to private sector, and to others. So it would be a one-size-fits-all type of organization that would not allow for diverse voices and the innovation that has been the hallmark of the Internet.

Senator MARKEY. So since Tim Berners-Lee invented the World Wide Web in Bern, Switzerland, and now operates the World Wide Web Consortium out of MIT to have this international governance openness architecture model, there has been kind of a multi-constituency way in which the Internet has been governed, operated. So that's a very important set of principles that I think we want to understand.

And if it moves over to the International Telecommunications Union, it moves over to a different model altogether that ultimately could be much more dangerous and put much more control in the hands of foreign ministers and defense ministers in terms of the decisionmaking rather than this broad-based Internet constituency that has developed over the last 25 years across the planet.

So we thank you, Ambassador Gross, and we thank all of you for being here today.

The CHAIRMAN. Thank you, Senator Markey.

I just want to raise one last point. And, by the way, this has been a great discussion. Thank you all very much for all the different perspectives that you've shared, and you've answered a lot of ques-

tions for members of this committee and our staffs that hopefully will shed further light on the discussion of this very important subject moving forward.

But I want to direct a question to Mr. Sullivan, because it has been raised a number of times here today, and that's the concern about the Internet being captured by foreign governments or other bad actors if U.S. oversight of IANA is relinquished. So speaking from your perspective as an Internet engineer, could you please describe to the Committee how authoritarian countries like Iran or Russia or China could use a captured ICANN to disrupt the Web outside of their own borders, including inside the United States?

Mr. SULLIVAN. Thank you, Mr. Chairman. The answer is they can't. The whole system is designed to prevent that kind of thing. Countries can do things inside their own borders, but they cannot subvert the Internet's design in order to cause other people to do things. That's the way a voluntary Internetwork of multiple other networks works. On my networks, I make my rules. If somebody else wants to make rules for my network, they can't because I run it.

That's the key strength here, and that's the reason that we need to get the governments out of this business, because it sends this message that it could be controlled. It can't be. It's designed not to be. They can't take it over.

The CHAIRMAN. What's the technical DNS mechanism at ICANN that these countries would use to censor the Internet in other countries?

Mr. SULLIVAN. So the only thing that ICANN controls is the root zone, the very top of the DNS. So each name in the DNS has these dots in it. You're familiar with the dots. And each dot is actually a point where somebody else can take over the operation of the name. So, for instance, in the case of a domain name that I happen to run, *anvilwalrusden.com*, the root delegates dot-com to a company called Verisign. They operate on the dot-com registry, and then I operate the *anvilwalrusden.com* domain.

So the only thing that you can get control over in this case is the root zone, if you could get control over it, and that would—I mean, in the wildest fantasy, somebody could take this over and they could de-delegate, say, dot-com from the root, and that would prevent everything underneath dot-com from working. But they cannot prevent a single domain name from working by controlling the root, because they can only control the delegation to the next level down.

This is a key strength of the way the DNS is designed. It's a fundamental thing about it, that it's a distributed operation, and that means that you don't have any control in any one place. This basic fact of the way all of the pieces on the Internet are designed is this distributed operation, and distributed operation makes it more resilient and resistant to control.

The CHAIRMAN. So what you're saying is that there isn't any way in which China could use ICANN to censor the Internet in the United States?

Mr. SULLIVAN. Exactly correct.

The CHAIRMAN. Well, I think that's an important point, because, obviously, it has come up a lot.

Well, look, again, I want to thank you all for your participation and for all your good work in this area. This is an issue that we'll be giving a good amount of attention to over the course of the next several months for obvious reasons.

So I would just say that we'll keep the hearing record open for 2 weeks, during which time Senators are asked to submit any questions for the record. Upon receipt, we would ask the witnesses to submit their written answers to the Committee as soon as possible.

Thank you all very much. This hearing is adjourned.

[Whereupon, at 12:10 p.m., the hearing was adjourned.]



## A P P E N D I X

PREPARED STATEMENT OF HON. BILL NELSON, U.S. SENATOR FROM FLORIDA

Nearly two decades ago, the U.S. Federal Government began to take the steps necessary to transfer control of the technical and operational aspects of the Internet to the broader international Internet community. The government recognized that although the foundations of the Internet may have been laid in the United States, the Internet itself was a global institution.

Today, the Committee will hear from stakeholders about the plan developed by the global Internet community to complete the work of privatizing the technical elements of the Internet begun in 1998. I want to commend the work done by hundreds of representatives from business, government, and civil society to develop a transition plan for the IANA functions.

This proposal is a concrete demonstration that the multistakeholder model of international Internet governance works. And it reminds all of us in Congress about how important it is that we remain committed to this model and its ability to help maintain a free and open Internet.

The plan that has been presented to the U.S. Government is the product of months of hard work, and represents a good faith attempt to develop a proposal that meets the requirements for the transition set forth by NTIA. I am pleased that we are here today conducting our own oversight of this transition and of the plan.

The broad Internet stakeholder community strongly supports the transition plan and believes that it meets NTIA's requirements, including ensuring that the functions, and ICANN itself, cannot be captured by another government or intergovernmental body. I trust that NTIA will conduct a thorough review of the proposal to affirm that it meets all of its requirements. And I know NTIA will monitor the work of ICANN in the coming months to make necessary changes to its bylaws and implement other reforms essential to a successful IANA transition.

The transition is widely supported by the U.S. business and tech community, who believe that completing the transition is an essential diplomatic tool to bolster U.S. international technology and communications policies. Congress itself has spoken in the past with a single voice about the need to prevent fracturing of the Internet and the importance of bolstering the multistakeholder model of international Internet governance. In fact, NTIA and the State Department just filed formal comments in China the other day affirming our national commitment to the decentralized model of international Internet governance and opposing China's proposed attempt to thwart that model.

I know that some continue to believe that the IANA transition should not happen, or prefer to put new hurdles in the way of the transition as a way to maintain the status quo. The time for delaying this transition is over.

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PREPARED STATEMENT OF CHRIS CALABRESE, VICE PRESIDENT, POLICY,  
CENTER FOR DEMOCRACY & TECHNOLOGY

Chairman Thune, Ranking Member Nelson, and members of the Committee:

Thank you for the opportunity to submit these comments on behalf of the Center for Democracy & Technology (CDT). CDT is a nonpartisan, nonprofit technology policy advocacy organization dedicated to protecting civil liberties and human rights on the Internet and around the world. We have been fully involved in the Internet Assigned Numbers Authority (IANA) functions transition since it was announced by the National Telecommunications and Information Administration (NTIA) in March 2014. We have participated in both the Working Group on IANA stewardship as well as the Working Group on enhancing the Internet Corporation for Assigned Names and Numbers' (ICANN) accountability. Now that the IANA transition plan has been forwarded to NTIA for inter-agency review, CDT and others are reviewing the draft ICANN bylaws and participating in the implementation planning for the

post-transition IANA. We are committed to ensuring that the transition fully reflects the intent of the multistakeholder community's transition and accountability proposals.

Replacing the oversight role of the NTIA is not a simple matter, nor is changing the governance structure of an organization, let alone one as unique as ICANN. Yet the global multistakeholder community rose to the challenge and over two years crafted a robust and credible transition plan. The work was considerable: the IANA transition was organized, planned, discussed and debated in more than 1,100 events around the world, with stakeholders spending more than 800 hours in meetings and exchanging more than 33,000 messages on mailing lists. This community effort shared common goals: the continued stability, security, and resiliency of the Domain Name System (DNS), an IANA function that continues to operate in a neutral and transparent manner, and an ICANN that is fully accountable to its global, multistakeholder community.

Throughout the work on the transition we have been acutely aware of the need to satisfy NTIA's requirements that the proposal: (1) support and enhance the multistakeholder model; (2) maintain the security, stability, and resiliency of the Internet DNS; (3) meet the needs and expectation of the global customers and partners of the IANA services; and (4) maintain the openness of the internet. NTIA further stated that it would not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution. CDT believes that the IANA transition plan that was forwarded by the multistakeholder community to NTIA at the March 2016 ICANN meeting in Marrakech accounts for and satisfies these requirements.

The IANA transition plan places the responsibility for the Domain Name System firmly with ICANN's multistakeholder community. This community has been successfully developing policies for the DNS through multistakeholder processes since 1998. It comprises professionals from across the main stakeholder groupings of ICANN—businesses, registries and registrars, the technical community, entrepreneurs, academia, civil society, and users—all of whom are committed to the stability, security, and resiliency of the internet. Transitioning the U.S. Government's administrative role and stewardship to this community is not a step into the unknown; it is a transition to a highly competent and experienced community that has managed the DNS to date and will safeguard it into the future.

Nor is this transition imperilling the Internet or making it more susceptible to government capture; safeguarding against this potential was another key criteria for NTIA and for the community that developed these proposals. To date, the United States Government's role has been effectively hands-off, entrusting the management of the Internet to this community since the creation of ICANN. As NTIA noted in its press release announcing its intent to transition oversight of the IANA functions in March 2014, the U.S. Government has "envisioned that the U.S. role in the IANA functions would be temporary. The Commerce Department's June 10, 1998, Statement of Policy stated that the U.S. Government "is committed to a transition that will allow the private sector to take leadership for DNS management."

The U.S. Government's current role is two-fold: the first is a clerical function to ensure that any changes to the root zone file have followed the appropriate procedures; the second is a stewardship role that is largely related to the award of the contract to ICANN for the provision of the IANA services in other words, if ICANN had not fulfilled its contractual obligations at some point, NTIA could have awarded the IANA functions contract to another entity). While the U.S. Government will be stepping back, its role will not be assumed by other governments but by the community that has managed the DNS all along. This community has delivered a transition plan that empowers the whole of the multistakeholder community, which was the goal of the U.S. Government when setting up ICANN and a key NTIA criterion for the transition proposal to be successful. The transition does not empower governments alone—and certainly not individual governments.

When the community and the ICANN Board endorsed the IANA transition plan in Marrakech, it was clear that this significant achievement could not have happened without the input of the broad cross-section of the global multistakeholder community and the range of business, technical, legal, and policy know-how and expertise that this input brings. The IANA transition plan has been a proving ground for multistakeholder approaches to Internet governance. This two-year process has delivered two proposals that are possibly the most successful expression of multistakeholder approaches to Internet governance yet. And the two Working Groups have demonstrated the efficacy of processes that are open, transparent, and inclusive—characteristics that are essential to ensuring that the openness of the Internet is maintained.

The transition plan both supports and enhances the multistakeholder model; it also meets the needs and expectations of the global customers and partners of the IANA services. The accountability measures that have been put in place reinforce the role of the multistakeholder community in ICANN and place important checks on the organization's mission. The new, limited powers provided to the community ensure that the community as a whole—and no one stakeholder group—remains firmly in control when it comes to ICANN's governance.

These new community powers include, among others, the powers to: (1) reject ICANN Budgets, IANA Budgets, or Strategic/Operating Plans; (2) reject changes to ICANN's Standard Bylaws; (3) approve changes to new Fundamental Bylaws and Articles of Incorporation; (4) remove an individual ICANN Board Director; (5) recall the entire ICANN Board; (6) initiate a binding Independent Review Process (where a panel decision is enforceable in any court recognizing international arbitration results); and (7) reject ICANN Board decisions relating to reviews of the IANA functions. From rejecting strategic plans and budgets to, in the worst case of board-overreach, removing and replacing the entire ICANN Board, these accountability powers are an effective way of ensuring that the stability and continuity of the Internet remain front and center at ICANN post-transition.

Of course, these powers may not be exercised on a whim; the community must go through a rigorous process of engagement and escalation that should exhaust all possibilities of resolution before pursuing the use of a particular power. Should there be no resolution, there must be agreement to use a power among a minimum number of constituencies within the ICANN community. This ensures that no one party can unilaterally take actions that could impact ICANN, the IANA functions or the DNS. Post-transition accountability will reside with the empowered ICANN multistakeholder community as a whole; its significant expertise and know-how will very capably guide ICANN, the IANA functions, and the DNS in the future.

The imperative that the transition must not imperil the security, stability, and resiliency of the Internet has been foremost in the community's mind. The IANA transition plan emphasizes continuity of operations by having ICANN be the IANA functions operator post-transition. At the same time, the plan provides mechanisms for the community, and particularly the global customers and partners of the IANA functions, to ensure that ICANN meets agreed performance targets. Were ICANN to fail to meet these targets, the community could change the IANA functions operator—in other words, seek an alternative to ICANN to undertake essential DNS-related administrative tasks.

It is important to note that within the ICANN multistakeholder community, the U.S. Government will continue to play its role in the Government Advisory Committee, just as representatives of U.S. businesses, registries and registrars, technical bodies, and civil society organizations will continue to play their roles in their respective constituencies. The transition plan does not diminish the role of any stakeholder—quite the opposite: all stakeholders are appropriately empowered to hold ICANN to account and to ensure that the stability, security, and resiliency of the DNS post-transition.

Of course the community's work is not over. Work on the new ICANN bylaws has been going smoothly and we hope they will be adopted by the ICANN Board on May 27. Additional accountability-related work—known as Work Stream 2—will continue beyond the transition in areas such as human rights, community accountability, and ICANN transparency.

There is no doubt that the community and particularly the WGs must remain vigilant in the implementation planning for the post-transition IANA. But by producing a transition plan that is robust, credible, and implementable—and, importantly, that satisfies NTIA's criteria—the community's work on IANA stewardship and ICANN accountability paves the way for the multistakeholder community to take on the mantle of stewardship that the U.S. Government currently assumes. CDT is convinced that the community and the U.S. Government can transition on the anticipated date.

There are those who suggest that an extension of the contract between NTIA and ICANN is needed because the IANA transition plan is untried and untested. We do not support such an extension. It would indicate a clear lack of confidence in the multistakeholder transition plan and would undermine not only the legitimacy of ICANN's community but also the legitimacy of multistakeholder approaches to Internet policy more generally.

Nor, for similar reasons, does CDT support a call for a vote in Congress on the IANA transition. A vote would represent an attempt by one government to unilaterally decide the future of key technical functions of the internet—precisely the outcome the IANA functions transition is designed to avoid. Such an act would only

provide fuel to those governments who seek greater government control over the Internet and who decry multistakeholder approaches around the world.

We must all understand that if there is an unwarranted delay or if the transition does not occur, the multistakeholder model of Internet governance could be irretrievably undermined and there would be unprecedented ammunition for those nations that want to see increased intergovernmentalism and state control of the internet. A failure to transition would be seen as a license by some governments to assert greater control over the Internet and place greater restrictions on its openness. This, in turn, would jeopardize the future of the internet, its role in promoting free speech and human rights, and the significant benefits it can bring to societies and economies across the globe.

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#### OBAMA'S INTERNET ENDANGERMENT

By Rick Manning—7 Jun 2016

### **Should oversight over the Internet naming conventions and top-level domains be relinquished to a group that just four years ago was in danger of being fired as a vendor due to its lack of accountability?**

Some, like Michael Chertoff, say yes. He worries *in Politico* that, “If Washington fails to follow through on its longstanding commitment to privatize the DNS, it will fuel efforts by authoritarian regimes to move Internet governance to the United Nations—and potentially put the Internet, as we know it, at risk.”

Apparently Chertoff has not been keeping up to date on the latest happenings in the world of Internet governance, because if he had, he would have acknowledged the *State Department's* concern that China has already developed its own Internet root zone and DNS system. For all intents and purposes, the Chinese government has chosen to put the tools in place to break the Internet any time its leaders choose. And I'm confident that Secretary Chertoff would agree that in today's environment, the Chinese government is going to proceed according to its interests.

What's more, he would know that China attempted to cut a deal with the holders of the top-level domain .XYZ which is the sixth largest in the world to exclude the use of 12,000 words in domain names in exchange for gaining access to their markets. This initial attempt by the Chinese to flex their market muscle to control content can only get worse and it provides little comfort to those of us with offensive words like *www.getliberty.org* for a domain name to lose the soft power of the United States as an offset to the Chinese.

However, what is most shocking about Chertoff's piece is his failure to even mention that the architect of the transition of multistakeholder model for Internet governance under current U.S. vendor ICANN, Fadi Chehadé, no longer is leading the California-based tax exempt non-profit, but on the eve of the transition has *accepted a role as a senior, unpaid adviser* to a Chinese government-led effort to counter ICANN.

This is the true elephant in the room.

In political terms it is as if the primary campaign manager for Hillary Clinton were to leave her campaign and sign up with Donald Trump's general election effort bringing all the knowledge of the systemic weaknesses of the campaign organization to an opponent eager to exploit them.

No one in their right mind would be comfortable with that arrangement, yet that is exactly the situation facing an untested, vulnerable ICANN under a multistakeholder model suddenly freed from the protection of the U.S. Government. A model that all the “experts” who worked on it assure is impenetrable, an assurance eerily similar to the one offered by those who built the Titanic before its maiden voyage proved otherwise.

Chertoff states in his almost puerile missive of vague warnings against a future United Nations control of the Internet that, “While authoritarian governments may be happy to see the U.S. relinquish its oversight role, privatizing the DNS is a much better way to guarantee broad support for the system among allies and the developing world for the multistakeholder approach to Internet governance.”

In a nutshell, the argument is that an unaccountable ICANN operating in an environment where the U.S. has the same say as Algeria, with the real power divested to companies like Google and others is more secure than the current situation where the United States can stare down anyone who seeks to impose speech restrictions on the web as China attempted recently.

Beyond the patent absurdity of the claim, it is equally absurd to assume that the United Nations won't attempt to grab at a now ripe for the plucking Internet gov-

ernance role. Why do they want it so badly? It would provide an independent funding source that the U.N. has always craved.

While politicians in D.C. often put out press releases opposing “taxing the Internet”, ICANN already taxes the Internet through its fee structure for effectively leasing top level domain names. Anyone who uses a .net address is already paying \$1 to ICANN in a hidden pass-through fee for that privilege as an example.

Verisign reports that at the end of 2015, there were approximately 314 million domain name registrations and growing each quarter. It doesn’t take a math major to see the allure of controlling the money machine that creates these top-level domains and charges a fee for every one that is purchased.

ICANN revenue in 2015 was \$219 million from these and other fees, and they have used some of this tax-free largesse to hire some of the *most prestigious firms in the U.S.* to lobby for full control of this system, free from having to worry about keeping their vendor contract with the U.S. And for the same reason that ICANN wants to control this money tree without real oversight, the nations who are a small part of ICANN’s multistakeholder structure will not be sated by the U.S. ceding control. Instead, it is guaranteed that they will seek to grab the pot of gold through a U.N. structure that would more directly benefit them, and increase their power. Congress has wisely chosen to defund the Obama Administration’s effort to transfer oversight over Internet governance to its vendor over the past two years. Now they need to get behind the Cruz-Duffy Protecting Internet Freedom Act to extend the contract for another two years, providing more time to stress test the system, and measure the impact of Chehadé’s seemingly switching sides in the debate. Notably, Senator Marco Rubio also recently circulated a letter also urging an extension garnering the signatures of many of his colleagues on the Senate Committee overseeing the issue.

One thing that the House Energy and Commerce Committee got right when discussing this issue is that there will be no going back from the transition. Given that, Congress needs to get it right, and for now, that means extend the contract and let the next Administration re-evaluate what *Freedom of Information Act* records show was President Obama’s hastily made decision.

*The author is president of Americans for Limited Government*

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. MARCO RUBIO TO  
MICHAEL BECKERMAN

*Question.* The revised bylaws include provisions that ensure that ICANN maintains the ability to enter into and enforce contracts with registries and registrars, as well as include provisions that protect from ultra vires challenge Public Interest Commitments (PICs) agreed to by certain registries and registrars operating in the new gTLD marketplace. Such PICs are meant to mitigate DNS abuse in the new gTLD market, which is especially important as we see illegal behavior now taking place, including the prevalence of child abuse imagery cropping up for the first time in new gTLDs in 2015.

- To what extent is the ICANN community, including the Board, committed to ICANN’s role in mitigating DNS abuse through contract enforcement?
- Does the accountability proposal put forward sufficiently ensure that ICANN will enforce its contracts with registries and registrars in this regard?

*Answer.* The Internet Association firmly supports the ability of ICANN to enforce its contracts with registries and registrars. As a group of companies entirely reliant on a stable and trustworthy internet, it is in our interest to prevent abusive behavior in the Domain Name System (DNS). Critical to that safe environment is a system in which all stakeholders do their part to ensure illicit activity is minimized. We believe that the community, through the provisions you reference in your question, has preserved ICANN’s ability to enforce existing contracts. Notably, because the ICANN community is now empowered to challenge action or inaction by the Board and is developing additional accountability mechanisms as part of our “IANA Transition Work Stream 2” efforts, it will be possible to ensure that the Board is exercising oversight that results in ICANN’s proper execution of its enforcement role according to ICANN’s bylaws.

At the same time, it is important to note that ICANN has a narrow technical remit and, as ICANN CEO Göran Marby recently pledged, does not have the authority or capability to “interpret or enforce laws regulating websites or website content.” The Internet industry is committed to working closely with ICANN to keep the Internet free and open, while working within ICANN’s remit to address illicit online activity. This includes helping to ensure that Registry Agreements and the

Registrar Accreditation Agreement (RAA) are properly implemented. Contrary to some misinterpretations, the RAA only requires domain name registrars to “take reasonable and prompt steps to investigate and respond appropriately to any reports of abuse.” This agreement does not mandate that a registrar remove or delete domains; but rather that it receive and investigate the abuse before determining the appropriate next steps. Registrars are not equipped with the appropriate enforcement tools to control, monitor, or remove specific content or specific users who post unauthorized works to a domain.

In addition to working closely with ICANN, the Internet industry also supports various industry-led efforts to develop guidelines and best practices to prevent a range of illicit activity online.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JOHN THUNE TO  
STEVE DELBIANCO

*Question.* Mr. DelBianco, I understand the argument that increasing the threshold for the ICANN Board to reject advice from the GAC from 50 percent to 60 percent is offset by the fact that any GAC advice to the ICANN Board must first achieve complete consensus among the 162 countries, meaning that the U.S., or any country for that matter, may object to any advice the GAC might offer. But what about a scenario where our government is asleep at the switch and fails to object, or actually agrees with some terrible advice from the GAC? What safeguard is in place against that type of scenario?

*Answer.* Your question assumes a scenario where no government—not even the U.S.—would formally object to proposed GAC advice that would be adverse to interests of American businesses and citizens. Under such a scenario, there are additional safeguards in place to prevent implementation of adverse GAC advice.

First, a new restriction on GAC advice is a requirement that advice “is communicated in a clear and unambiguous written statement, including the rationale for such advice.”<sup>1</sup> If the GAC advice lacked clarity or rationale, the ICANN board would not be required to consider that advice.

Second, the ICANN board can reject GAC advice with a vote of 60 percent of the directors. The board would take into account public comments from non-governmental stakeholders, and may reject GAC advice for any reason.

If the board rejects GAC advice, it must “try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution” in consultation with the GAC. This is an obligation only to “try,” and does *not* oblige ICANN to find a solution that is acceptable to the GAC. In these consultations, the board could propose modifications to the GAC advice that would mitigate the adverse element. But if GAC refused to adequately adjust its advice, the board’s decision to reject would still hold, and the GAC advice would be set aside.

Third, if the ICANN board accepted such GAC advice, ICANN could be stopped from implementing that advice by a challenge brought under the enhanced Independent Review Process (IRP). An aggrieved party or the Empowered Community can bring an IRP challenge based on actions of ICANN to “ensure that ICANN does not exceed the scope of its limited technical Mission and otherwise complies with its Articles of Incorporation and Bylaws.”<sup>2</sup> While an aggrieved party must pay its own legal costs for the IRP, an Empowered Community IRP would mean that ICANN must pay all legal costs.

To bring an Empowered Community IRP requires support of 4 of the 5 stakeholder groups in the Empowered Community, which includes the GAC. However, the new bylaws ensure that governments could *not* block a community challenge of ICANN Board’s implementation of GAC advice. In what is known as the “GAC Carve-out”, the bylaws exclude the GAC from the Empowered Community decision about whether to challenge a board action based on GAC consensus advice, so the approval of just 3 stakeholder groups is required to challenge ICANN’s acceptance of GAC advice.

Several governments vigorously opposed these new bylaws provisions to limit GAC influence and lock-in their consensus method of decision-making. In a statement issued Mar-2016, France’s minister for digital economy complained about ICANN’s new bylaws:<sup>3</sup>

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<sup>1</sup> May-2016, Section 12.3, ICANN Bylaws, at <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>

<sup>2</sup> *Ibid.*, Section 4.3 a

<sup>3</sup> 24-Mar-2016, “French scream sacré bleu! as U.S. govt gives up the Internet to ICANN”, at [http://www.theregister.co.uk/2016/03/24/france\\_slams\\_us\\_govt\\_internet\\_transition/](http://www.theregister.co.uk/2016/03/24/france_slams_us_govt_internet_transition/)

“Despite the continued efforts of civil society and many governments to reach a balanced compromise, elements of this reform project will marginalize states in the decision-making processes of ICANN, especially compared to the role of the private sector.”

Unnamed French foreign ministry officials also told *Le Monde* they were unhappy with the end result, saying: “This is an unsatisfactory condition. The consensus requirement only produces warm water. And that does not put the GAC on the same footing as the other committees of ICANN.”

The French official is right—the GAC is not on the same footing as other ICANN stakeholders. That, however, is by design. Notwithstanding criticism from certain governments, the full package of transition accountability measures sufficiently cabins governmental influence and provides sufficient safeguards to block implementation of GAC consensus advice that is adverse to the non-governmental Internet stakeholder community.

Thank you for your question. I am at your service to elaborate on these responses and address other questions and concerns you might have.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARCO RUBIO TO  
STEVE DELBIANCO

The revised bylaws include provisions that ensure that ICANN maintains the ability to enter into and enforce contracts with registries and registrars, as well as include provisions that protect from ultra vires challenge Public Interest Commitments (PICs) agreed to by certain registries and registrars operating in the new gTLD marketplace. Such PICs are meant to mitigate DNS abuse in the new gTLD market, which is especially important as we see illegal behavior now taking place, including the prevalence of child abuse imagery cropping up for the first time in new gTLDs in 2015.

*Question 1.* To what extent is the ICANN community, including the Board, committed to ICANN’s role in mitigating DNS abuse through contract enforcement?

Answer. ICANN community members who developed the new accountability proposal were committed to maintaining an Internet that is not subject to government restrictions on free expression. At the same time, we were committed to ensure that abuse safeguards in the new gTLD registry contracts would continue to be enforceable, and not subject to challenge under the more explicitly limited mission statement for ICANN. All 7 ICANN stakeholder groups approved the new proposal earlier this year, and both the ICANN board and NTIA accepted the recommendations. Here is how this commitment was articulated in the new bylaws:<sup>4</sup>

ICANN’s performance of its obligations or duties thereunder, may not be challenged by any party in any proceeding against, or process involving, ICANN (including a request for reconsideration or an independent review process pursuant to Article 4) on the basis that such terms and conditions conflict with, or are in violation of, ICANN’s Mission or otherwise exceed the scope of ICANN’s authority or powers pursuant to these Bylaws (“Bylaws”) or ICANN’s Articles of Incorporation.

This protection from challenge is applied to “all registry agreements and registrar accreditation agreements between ICANN and registry operators or registrars in force on 1 October 2016,” which includes agreements and renewals that contain the abuse “Safeguards” requested by the GAC.

Such safeguards could still become part of registry and registrar agreements negotiated in the future, as long as they avoid giving ICANN new powers to “regulate (*i.e.*, impose rules and restrictions on) services that use the Internet’s unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a).” And the new bylaws expressly authorize ICANN to enter and enforce contracts: “ICANN shall have the ability to negotiate, enter into and enforce agreements, including public interest commitments, with any party in service of its Mission.”

Moreover, all registry and registrar contracts require implementation and enforcement of any Consensus Policies that are developed by the ICANN stakeholder organization for generic TLDs (GNSO). These Consensus Policies are the mechanism by which the ICANN community addresses DNS abuse that was not already or adequately addressed in current contracts. For example, the GNSO developed policy re-

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<sup>4</sup>May-2016, Section 1.1 of ICANN Bylaws, at <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>

garding display of information about domain name registrants (“Thick Whois”). This policy will become binding and enforceable on all registries and registrars once implementation is complete.

*Question 2.* Does the accountability proposal put forward sufficiently ensure that ICANN will enforce its contracts with registries and registrars in this regard?

Answer. The accountability proposal did not alter ICANN’s existing obligations to enforce its contracts and to enforce consensus policies against registries and registrars. As always, anyone can bring contract enforcement matters to the attention of ICANN’s compliance department. However, ICANN moves deliberately to investigate and respond to enforcement complaints, not always to the satisfaction of those making the complaint. Concerns about enforcement have historically centered on ICANN’s speed of follow-up and on differing interpretations of contract terms and policies.

There are two primary ways that ICANN can be made to enforce its contracts against registries and registrars.

First, affected parties can invoke the enhanced Independent Review Process (IRP) if ICANN was failing to enforce its contractual obligations and its inaction was in violation of ICANN’s Commitments and Core Values. The IRP is a binding process and decisions of the independent reviewer can be enforced in California courts, or in any court that recognizes international arbitration proceedings.

Second, affected parties may work within the ICANN stakeholder organization for generic TLDs (GNSO) to amend and clarify any Consensus Policy where ICANN’s compliance department is taking a too narrow or too broad interpretation of the policy.

The sufficiency of these measures will almost certainly be tested in the years ahead. If the ICANN community finds these measures insufficient, the next step is to propose changes that increase contract enforcement powers over registries and registrars. Such changes could be proposed as recommendations from formal reviews of accountability and transparency, or of the review of the new gTLD program. Under the new bylaws, registries and registrars alone would not be able to block a community challenge if ICANN refused to implement such bottom-up recommendations for stronger contract enforcement.

NetChoice appreciates the hard work accomplished in this regard so far and believes that ICANN and the multistakeholder community should continue to work collaboratively to mitigate DNS abuse within the confines of ICANN’s mission.

*Question 3.* Section 27.2 of the new ICANN bylaws lays out the process for developing and adopting Work Stream 2 issues, which include important matters like human rights, jurisdiction, and improvements to ICANN’s transparency. The stated process involves CCWG development of the proposal followed by dialogue and exchanges with the Board. Subsection (v) concludes, “If, after the CCWG-Accountability modifies a Work Stream 2 Recommendation, the Board still believes it is not in the global public interest to implement the Work Stream 2 Recommendation, the Board may, by a vote of a two-thirds majority of the Board, send the matter back to the CCWG-Accountability for further consideration. The Board shall provide detailed rationale to accompany its action. If the Board determines not to accept a modified version of a Work Stream 2 Recommendation, unless required by its fiduciary obligations, the Board shall not establish an alternative solution on the issue addressed by the Work Stream 2 Recommendation until such time as CCWG-Accountability and the Board reach agreement.” What is the global public interest?

Answer. For several years, NetChoice argued that for purposes of ICANN, the global public interest should be defined and limited to ICANN’s scope—the Domain Name System (DNS) and Internet Protocol address numbers. During the recent transition planning, we proposed our definition for global public interest: “*the availability and integrity of registrations and resolutions*”.

This definition would encompass global access to registering and resolving (using) domain names anywhere in the world, in any script or language, with the expectation that users of domain names could trust that the name was not being used for fraudulent or abusive purposes.

Unfortunately, we were unable to garner consensus for that definition. In fact, no single definition achieved consensus support, so ICANN will continue to define public interest in the context of its decisions and actions, as described in our next answer.

A definition of the public interest depends on the definition of “public.” The “public” is composed of multiple and diverse elements that frequently have very different interests, thereby making it very difficult to reach consensus on a single definition.

*Question 4.* How will the global public interest be determined?



Answer. Global public interest is defined by the multistakeholder community, in exercising its role in developing policies and holding the ICANN corporation and board accountable for its actions and inactions. This does not result in community agreement on a formal definition of “global public interest”. Rather, the new Commitments and Core Values in ICANN bylaws defer to the multistakeholder community to ascertain public interest in the context of each situation:<sup>5</sup>

Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent;

While this approach does not give us a single, simple definition of global public interest, it does have the advantage of letting Internet stakeholders define the concept, instead of leaving that definition to ICANN’s management and board.

*Question 5.* Under the outlined process, could the Board indefinitely delay implementation of Work Stream 2 with the justification that the proposed Work Stream 2 proposals are not in the global public interest?

Answer. No, the board cannot “indefinitely” delay implementation of a Work Stream 2 recommendation for which the ICANN community has consensus support to force implementation of its recommendations.

The rationale for separating Work Stream 1 and 2 tasks was to identify what had to be implemented *before* the IANA contract expired, after which there would be less leverage to force accountability measures that would be resisted by ICANN’s board. That’s why Work Stream 1 includes new powers to block the board’s budget, overturn a board decision through an IRP challenge, and to recall the board of directors. The community deemed those powers sufficient to force a future ICANN board to accept Work Stream 2 changes that are developed and supported by community consensus.

First, the community can challenge the board with an Independent Review Process (IRP) for failing to follow its bylaws commitment to honor the bottom-up multistakeholder process. This challenge would directly address the board’s argument that proposed recommendations were not in the “global public interest”. As noted above, ICANN’s new bylaws defer to the community—not the board—to define the global public interest:

. . . ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest.

An IRP decision is a binding process taking approximately 6 months, and decisions of the independent reviewer can be enforced in California courts, or in any court that recognizes international arbitration proceedings. So IRP decisions could terminate any delay that was being caused by the ICANN board.

Second, the community can recall the ICANN board of directors, and designate new directors who would understand that Work Stream 2 recommendations should be accepted. If these new directors failed to accept the recommendations, they too could be recalled.

Taken together, these two measures ensure that ICANN board members cannot indefinitely delay implementation of recommendations that have the consensus support of the ICANN community.

*Question 6.* Since such a delay would be consistent with the bylaws and would be within the scope and mission of ICANN, aside from spilling the Board, what would be the tools available to the ICANN community to overcome Board resistance and what are the steps for exercising those tools?

Answer. The whole point of separating Work Stream 1 and 2 tasks was to identify what had to be implemented *before* the IANA contract expired, after which there would be less leverage to force accountability measures that would be resisted by ICANN’s board. That’s why Work Stream 1 includes new powers to block the board’s budget, overturn a board decision through an IRP challenge, and to recall board directors. The community deemed those powers sufficient to force a future ICANN board to accept Work Stream 2 changes that are developed and supported by community consensus.

First, the community can challenge the board with an Independent Review Process (IRP) for failing to follow its bylaws commitment to honor the bottom-up multistakeholder process. This challenge would directly address the board’s argument

<sup>5</sup> May–2016, Section 1.2 of ICANN Bylaws, at <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>

that proposed recommendations were not in the “global public interest”. As noted above, ICANN’s new bylaws defer to the community—not the board—to define the global public interest:

. . . ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest.

An IRP decision is a binding process taking approximately 6 months, and decisions of the independent reviewer can be enforced in California courts, or in any court that recognizes international arbitration proceedings.

Second, as you note, the community can recall the ICANN board of directors, and designate new directors who would understand that Work Stream 2 recommendations should be accepted. If these new directors failed to accept the recommendations, they too could be recalled.

If these new directors failed to accept the recommendations, they too could be recalled.

*Question 7.* In your opinion, what would be the result of having a modest delay in the transition for the stakeholders and international community to make sure the accountability measures work properly?

Answer. During the committee’s hearing back in May–2016, I acknowledged that a modest delay of a few months might be useful in order to verify the creation of new organizational elements and the adoption of new ICANN Bylaws and Articles of Incorporation. At this point, these implementation steps are substantially complete. The required bylaws, articles, and entities have been put into place to implement the community’s transition proposal.

Your question suggests that a modest delay would allow the community to make sure that accountability measures work properly. But there is no way to predict when the ICANN community would exercise its new powers to challenge a board decision or recall directors. These are extraordinary measures that are not expected to be exercised often.

Moreover, one reason for having these accountability measures available is that they will deter the ICANN board from defying consensus recommendations of the ICANN community. So, the board is likely to accede rather than force the Empowered Community to invoke its new powers.

So, a modest delay of several months would bring no reasonable expectation of seeing how well new accountability measures are working.

Some critics of the transition might therefore call for a longer delay, but that would re-ignite the fire at the United Nations, who sees the legacy U.S. Government role as something *they* should be doing instead. With this transition we are eliminating the role where one government (the U.S.) holds ICANN accountable, and we are instead making ICANN accountable to the community of Internet stakeholders. This means the U.N. can no longer point to the U.S. Government role and say the U.N. should step into those shoes.

An indefinite delay of transition would signal that the U.S. Government does not actually trust the multistakeholder model that we are encouraging other governments to trust. The governments of China and Russia would likely exploit any delay to persuade moderate governments that the U.N. needs to replace the legacy U.S. role—a result that none of us would find acceptable.

At this point, an indefinite deferral of this transition could create far more downside than upside for the interests of U.S. Government, businesses, and citizens.

*Question 8.* Do you see potential benefits to a modest delay?

Answer. During the committee’s hearing back in May–2016, I acknowledged that a modest delay of a few months might be useful in order to verify the creation of new organizational elements and the adoption of new ICANN Bylaws and Articles of Incorporation. At this point, these implementation steps are substantially complete, so there is no longer any benefit there to defer the transition.

As explained in our response to your previous question, we believe the risks of indefinitely deferring this transition outweigh the minimal potential benefits of delay.

Thank you for these questions. I am at your service to elaborate on these responses and address other questions and concerns you might have.

RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JOHN THUNE TO  
HON. DAVID A. GROSS

*Question.* Ambassador Gross, how should Senators assess the fact that Russia, China, France, and Brazil all believe that this transition proposal reduces the power of governments?

*Answer.* Some governments have expressed concerns that the transition proposal limits governments' ability to participate in the ICANN community on equal terms with other stakeholders. This is because, post-transition, government participation in ICANN policy development will be limited to a purely advisory role within the Governmental Advisory Committee ("GAC"). The new ICANN bylaws confine the GAC in two important ways. First, GAC "advice" to the ICANN Board requires "consensus," defined as general agreement in the absence of any formal objection by any government, including the United States. Second, GAC advice can be rejected by a 60 percent vote of the Board, and government representatives cannot serve on the Board. Thus, in order for governments to dictate Board action, they would first need to obtain consensus (unanimous agreement) within the GAC, an organization in which the United States and other like-minded countries take an active role. Thereafter, any advisory decision still could be rejected by a 60 percent vote of the Board.

The consequence of these developments is that governments that failed to capture ICANN during the transition process now are refocusing their efforts on other venues, including the United Nations' International Telecommunication Union ("ITU"). In June, the presidents of China and Russia issued a joint statement supporting a multilateral global Internet governance system and "maintain[ing] [the] UN's important role in setting up global Internet governance mechanisms." Russia, China, Saudi Arabia, and others also are focusing on the ITU's upcoming World Telecommunication Standardization Assembly ("WTSA"), which will address several important Internet public policy issues. The ITU will be an important setting for post-ICANN debates about the appropriate role for governments in Internet policy.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARCO RUBIO TO  
HON. DAVID A. GROSS

*Question 1.* The revised bylaws include provisions that ensure that ICANN maintains the ability to enter into and enforce contracts with registries and registrars, as well as include provisions that protect from ultra vires challenge Public Interest Commitments (PICs) agreed to by certain registries and registrars operating in the new gTLD marketplace. Such PICs are meant to mitigate DNS abuse in the new gTLD market, which is especially important as we see illegal behavior now taking place, including the prevalence of child abuse imagery cropping up for the first time in new gTLDs in 2015.

- To what extent is the ICANN community, including the Board, committed to ICANN's role in mitigating DNS abuse through contract enforcement?
- Does the accountability proposal put forward sufficiently ensure that ICANN will enforce its contracts with registries and registrars in this regard?

*Answer.* I appreciate receiving the question about the important issue of mitigating DNS abuse. The final report of the Cross Community Working Group on Enhancing ICANN Accountability ("CCWG-Accountability") and the revised bylaws make it clear that the Public Interest Commitments ("PICs") and the registry contracts that contain them are deemed within ICANN's mission. The multistakeholder community as a whole is engaged in activity to mitigate DNS abuse and, in a June letter from ICANN CEO Göran Marby to the Coalition for Online Accountability, ICANN again commits to enforce the PICs contained in the Registry Agreements. The Internet Governance Coalition appreciates these statements from the ICANN CEO and believes that ICANN and the multistakeholder community should continue to work collaboratively to mitigate DNS abuse within the confines of ICANN's mission.

*Question 2.* The expansion of government authority in the ICANN transition proposal is concerning, but it clearly falls short of what governments like China, Russia, Iran, and France would like to achieve. A joint statement by several foreign ministries was quoted at the hearing saying that they were dissatisfied with the proposal and would like to see more power for governments. This raises doubts about assertions made by you and Mr. DelBianco that this proposal will blunt efforts of these governments to pursue their goals in the ITU. Why would these governments discontinue their efforts to expand government authority over the Internet in the ITU or anywhere else?

Answer. Thank you for your question. There appears to be a misunderstanding regarding my testimony at the hearing. As noted in my response to Senator Thune's question above, post-transition, government participation in ICANN policy development will be limited to a purely advisory role within the Governmental Advisory Committee ("GAC"), and the GAC itself is further confined by the new bylaws. However, deliberations about the appropriate role for governments regarding Internet governance are ongoing and shifting to other venues.

Governments that failed to gain influence over ICANN are turning their attention back to the ITU. In June, the presidents of China and Russia issued a joint statement supporting a multilateral global Internet governance system and "maintain[ing] [the] UN's important role in setting up global Internet governance mechanisms."<sup>5</sup> In October, the ITU's World Telecommunication Standardization Assembly ("WTSA") will convene, with an agenda likely to include a wide range of Internet-related issues. Governments like Russia, Saudi Arabia, China, and others are trying to expand the ITU's activities at WTSA further into Internet public policy-related issues. As a result, I do not believe that governments will discontinue their efforts to expand government authority over the Internet—rather, those efforts are shifting to the ITU and other venues.

Promoting and protecting a thriving Internet will require continued engagement in the global debate and ensuring that Internet governance mechanisms remain open, transparent, and representative of all relevant stakeholders. The transition will ensure that non-governmental stakeholders, including U.S. industry, will have front row seats in discussions about the Internet's future—making it easier, though no less challenging, to keep it free and open for future generations.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO  
RICHARD MANNING

*Question 1.* Mr. Manning, if the U.S. Government were to extend the IANA contract for two more years, what would you need to see during that time to become comfortable enough to support the transition plan?

Answer. The transition proposal should be postponed indefinitely.

One of the challenges with the proposed transition is that in ending ICANN's status as a vendor of the U.S. Government, it also ends First Amendment<sup>1</sup> protections against capricious actions by ICANN or its successor in Internet governance.

The pending proposal in front of ICANN's Board in Stream 2 that would put protecting "internationally recognized human rights"<sup>2</sup> in the group's bylaws should be viewed with deep alarm. This change would create an undefined, shifting standard that would put content control as a core value of ICANN. While some dismiss the concerns about delinking the First Amendment from ICANN activities through the transition, there can be no reasonable argument that ICANN's consideration of content control bylaws legislation so close to the proposed transfer, demonstrates that the organization has a dangerous blind spot toward the underlying freedoms upon which the free and open Internet has thrived.

Another challenge is that proponents of the transition argue that the multistakeholder community can better protect the Internet from a United Nations' takeover than the U.S. Government. This is absurd on its face. The private sector stakeholders are each subject to market based coercion, and have a fiduciary responsibility to their shareholders, not to the American public. The consequences of the private, publicly held stakeholders' fiduciary responsibilities are likely to be interpreted to mean that if making concessions on Internet governance opens up potentially profitable markets it becomes these companies' legal responsibility to trade concerns about Internet governance for increased fiscal opportunities and profitability.

There are many other unanswered areas, such as, the ending of pricing oversight for new and existing domain names at the ICANN and registrar levels effectively allowing ICANN to impose increased Internet fees/taxes with no oversight or control, and the overall ramifications of ICANN losing its anti-trust exemption<sup>3</sup> which the NTIA has completely ignored according to recent Freedom of Information Act releases,<sup>4</sup> which make moving forward with the transition in the near term both unwise and extremely risky.

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<sup>1</sup> [https://w2.eff.org/Infrastructure/DNS\\_control/ICANN\\_IANA\\_IAHC/19980924\\_eff\\_new\\_iana\\_pressrel.html](https://w2.eff.org/Infrastructure/DNS_control/ICANN_IANA_IAHC/19980924_eff_new_iana_pressrel.html)

<sup>2</sup> [http://www.cruz.senate.gov/?p=press\\_release&id=2646](http://www.cruz.senate.gov/?p=press_release&id=2646)

<sup>3</sup> <http://www.wsj.com/articles/an-internet-giveaway-to-the-u-n-1472421165>

<sup>4</sup> <https://getliberty.org/wp-content/uploads/2016/08/NTIA-No-Records-Response-Antitrust-Analysis-08.16.16.pdf>

*Question 2.* Is there any scenario where you would support the U.S. relinquishing its role with respect to the IANA functions?

Answer. It is difficult to foresee any such scenario.

The names and numbers that constitute the Internet domain name system are no different than spectrum. We allot spectrum via the FCC, and whatever that system's flaws, it prevents any one power from consolidating control over the airwaves.

This government function, protecting the airwaves, protects the First Amendment, and creates a zone where democracy can thrive. Government oversight of the Internet domain name system is no different.

Any alternative to the First Amendment protections afforded by Federal Government oversight will inevitably fail leaving the Internet less open and free than it is today.

The Internet is a technology that the whole world utilizes. Via government oversight of the naming conventions, we have created spaces for speech to occur that did not exist previously.

NTIA has done a good job with the IANA functions contract, reflecting the Federal Government's duty as a light-handed steward of Internet governance while resisting calls for content based restrictions.

That remains true today. Americans for Limited Government urges you to not forget your vital role as protectors of constitutional safeguards, and creating an environment where freedom can thrive. Speech without protection will be assaulted and lost.

Surrendering Internet governance to foreign powers or even a corporate governance structure that is subject to foreign government coercion is akin to surrendering a vital piece of the spectrum to international regulators. It need not be housed in the United Nations to be a dangerous power to be wielded against U.S. interests. By allowing the transition to go through, Congress will be endorsing the creation of an unregulated global monopoly over the domain name system which is doomed to fail. This would be dangerous and foolish.

As stated earlier, ceding the IANA functions and the domain name system to the international community sacrifices the First Amendment's primacy over the government contracts. Nothing unconstitutional is allowed to happen under a government contract, but you will lose that guarantee when you lose the IANA functions. In fact, your Committee will no longer be relevant on this matter should the transition occur and will be impotent when inevitable questions and complaints arise.

No guarantee you receive from ICANN or anyone else will ever be as good as the First Amendment and its regime of Federal court intervention to ensure the NTIA contract with ICANN complies with the safeguards afforded by the First Amendment.

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RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARCO RUBIO TO  
RICHARD MANNING

During the course of the CCWG's consideration of its accountability reform proposal, the U.S. Chamber and other business interests requested that ICANN's bylaws be amended to allow for greater insight into how and to what extent ICANN interacts with governments and government officials (outside the formal interaction with the GAC). This request seems especially important in the wake of the revelations concerning ICANN's most recent CEO, Fadi Chehadé, and his interactions with the Chinese government before his departure in March. The CCWG delayed consideration of this important work during Work Stream 2.

*Question 1.* Do you agree that this type of transparency is important?

Answer. Transparency is important, however the notion that the U.S. Government should let the transition take place in order to get bylaws changes that bring more transparency to the domain name system is exactly backward. The U.S. Government contracting process is the only means to bring the transparency you seek. Once you let the contract go, you lose leverage to keep it away from other governments, and to enforce any transparency laws that have been put in place.

If Congress wants ICANN bylaws changes to bring more transparency, the most efficient means is for NTIA to never let the contract go and threaten the contract every time something needs to be reined in. ICANN is the contractor, and can be replaced. The domain name system and the free and open Internet as we currently know it, cannot be replaced. To maintain transparency and accountability, the U.S. Government should continue the current contract.

Besides, the idea the domain name system as currently constituted is non-governmental is a fiction. The U.S. Government has controlled these functions since their inception, and the rest of the world opted in. It's been under government contract

the whole time, and as recent as 2012, the Obama Administration was so frustrated with the vendor that they threatened to open up competitive bidding for the contract.<sup>5</sup> If we want more transparency, then NTIA needs to get in there and do its job, not collaborate with foreign interests who wish to capture the IANA functions. You don't create transparency by ceding power, you lose it.

If ICANN personnel working for the Chinese government is an unacceptable state of affairs, then ICANN should be fired and a new contractor found which is committed to maintaining a free and open Internet and not appeasing those who wish to destroy this fundamental principle.

*Question 2.* Should this important work have been punted to Work Stream 2?

Answer. The answer is no, as it denies Congress and the next Administration the ability to judge any transition based upon a full set of facts. But to be clear, Americans for Limited Government remains opposed to the transition regardless of promises, due to the permanent loss of First Amendment protections that are only afforded if the current relationship is maintained. The only thing that should be punted is the transition proposal itself. The work in Stream 2 is irrelevant to maintaining U.S. Government control of the IANA functions, which is the true task at hand. The only transparency that matters to the domain name system is U.S. Government oversight. You either keep it, or we'll lose it forever.

*Question 3.* What assurances are there that greater transparency such as this will be effectuated if the transition was to occur before the work is done?

Answer. There are no assurances you should accept. Delaying is a perfectly viable alternative to transitioning. You are contemplating sacrificing oversight of the IANA functions to an unaccountable global monopoly over the domain name industry. That is a bad idea. Instead, you should be maintaining oversight, not giving it up.

Right now the Internet domain name system has transparency via the NTIA contracting process, and our elected officials and Federal courts enforcing constitutional protections.

Right now, you have at least a regulated monopoly that can be reined in if need be. Once you let that go, you'll never get it back—and Congress will have no power to address the inevitable concerns that will occur in the future, and will rue the day the free and open Internet was unwittingly handed to foreign powers. The transition is not in the U.S. interests, nor is it in the interests of maintaining a free and open Internet. Given that, Congress should do everything in its power to stop the transition, if even for an additional two-year period so the next Administration can undertake a thorough review of this critical decision and if it decides to proceed, request an up-or-down vote in Congress to complete the transition.

*Question 4.* What other issue have been punted to Work Stream 2 that you see potential problem with?

Answer. The concern about whether ICANN will be locked in as a U.S. based non-profit corporation is one. The Committee is well aware of this concern so I won't address it further in this document.

Another obvious concern is the decision on whether to change ICANN's by-laws to include, "internationally recognized human rights." The fact that the value-neutral ICANN would even consider imposing some kind of human rights component to its by-laws demonstrates a willingness to create a future censorship regime based upon international standards. The Senator is reminded that the U.N. Human Rights Council is composed of abusers like Cuba, Venezuela and China and have recently condemned Israel<sup>6</sup> as the leading human rights abuser in the world, and in a recent report urged the federalization of all of U.S. law enforcement agencies<sup>7</sup> and the sublimation of U.S. law to international law.

The very fact that ICANN would consider making something as constantly changing and politically motivated as "internationally recognized human rights" part of their underlying mission even as Congress faces the decision on whether they can be trusted with full stewardship over the Internet's IANA is stunning. This consideration demonstrates that ICANN could in the near future, impose Internet content controls under the guise of 'human rights' rejecting the First Amendment protections that currently exist through their existing contract with the U.S. Government. This Stream Two consideration raises significant enough doubts about ICANN's judgment, ability and willingness to perform its functions as a vendor to the U.S. Government, that serious consideration should be given as to whether they should

<sup>5</sup> [https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=337abfa3fa508d260738052baf46bdf9&\\_cview=1](https://www.fbo.gov/index?s=opportunity&mode=form&tab=core&id=337abfa3fa508d260738052baf46bdf9&_cview=1)

<sup>6</sup> <http://www.foxnews.com/opinion/2016/03/29/can-t-make-it-up-un-names-democratic-israel-as-world-s-top-human-rights-violator.html>

<sup>7</sup> <http://freemassembly.net/news/usa-statement/>

continue to manage the contract on behalf of the U.S. Government after a two-year interim extension is put into place by Congress.

Congress can be assured that given the lucrative<sup>8</sup> functions ICANN currently performs there would be no shortage of competitors to replace them as the vendor should the next Administration find it advisable in 2018.

But let's be clear, as it pertains specifically to Stream 2 outcomes, even if Congress were to be satisfied, any decision made related to Work Stream 2 can be rescinded or revised at a later date by the current or a future ICANN Board. This impermanence in the governing structure and the instability it represents to future governance issues, makes any transition a risky gamble, because once the proposed transition has occurred, Congress will have no power to stop changes antithetical to a free and open Internet. And as is intended through the transition, the U.S. Government's oversight role will have been reduced to one of 160+ governments, effectively rendering the U.S. powerless to project a free and open Internet from an onslaught from a vast majority of the world's governments which fear that very concept.

Americans for Limited Government strongly urges that Congress act to compel the Obama Administration to renew the existing vendor contract with ICANN, allowing the next Administration to recommend to Congress whether the IANA functions should be turned over to ICANN's control, or whether a different course of action is needed to protect a free and open Internet into the future.

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RESPONSE TO WRITTEN QUESTION SUBMITTED BY HON. JOHN THUNE TO  
BRETT D. SCHAEFER

*Question.* Regarding a proposed two-year delay to the transition of the IANA functions, skeptics may always have a reason to call for just a little bit more time, turning a short delay into a de facto blocking of the transition indefinitely. Can you offer some objective, concrete benchmarks or criteria that would demonstrate that the new structure has been sufficiently proven effective?

*Answer.* There is no specific benchmark that would signal that ICANN is ready for the transition. The value of an extension is that it would allow implementation of the new ICANN bylaws and provide the ICANN community time to explore the new governance structure in practice, rather than in theoretical stress tests. It will also provide time for all of the Work Stream 2 reforms, which are not expected to be fully resolved and implemented until the summer of 2017, to be completed and implemented. Important issues yet to be settled include the nature and extent of ICANN's commitment to human rights, making ICANN more transparent to the community, adopting measures to make the staff more accountable, and the issue of ICANN's jurisdiction of incorporation, which remains an issue of dispute.

NTIA opposes a test period because they see the community powers as "a safeguard and tools of last resort. As such, there is no expectation that the community will ever need to exercise these powers in the next several years; indeed, the hope is that they are never exercised. The notion of 'testing' these would require significant failure on behalf of ICANN that is unlikely to happen in the near future, if at all."

I disagree. While there is no guarantee of a significant failure—and I hope one does not occur—there will be opportunities for the multistakeholder community to test out the new accountability mechanisms through already scheduled actions. These include approving or opposing bylaw changes related to further ICANN reforms envisioned under Work Stream 2 and working out the kinks of more mundane processes like consulting with the supporting organizations and advisory committees during the budget development process and providing notifications to the Empowered Community. The extension would maintain the option of reasserting U.S. oversight if the new community powers prove inadequate or ICANN resists promised accountability reforms sought by the ICANN community.

At the latest, I see U.S. oversight ending in 2019. The current contract cannot be extended beyond 2019 and continued U.S. oversight would require a new contract, which ICANN must enter into willingly. If ICANN fulfills its promises to the community on accountability and performs its responsibilities well, believe the multistakeholder community and most of the world's countries, including the U.S., will support ICANN continuing its role absent U.S. oversight.

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<sup>8</sup><https://www.icann.org/en/system/files/files/annual-report-2015-en.pdf>

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. MARCO RUBIO TO  
BRETT D. SCHAEFER

During the course of the CCWG's consideration of its accountability reform proposal, the U.S. Chamber and other business interests requested that ICANN's bylaws be amended to allow for greater insight into how and to what extent ICANN interacts with governments and government officials (outside the formal interaction with the GAC). This request seems especially important in the wake of the revelations concerning ICANN's most recent CEO, Fadi Chehadé, and his interactions with the Chinese government before his departure in March. The CCWG delayed consideration of this important work during Work Stream 2.

*Question 1.* Do you agree that this type of transparency is important?

Answer. Yes, it is critically important that an organization with the authority and resources that ICANN possesses be transparent about its interactions with all governments. ICANN discloses the information required by U.S. law, but this disclosure is not comprehensive. For instance, ICANN refuses to provide details to the ICANN community about its contracts with vendors like Albright Stonebridge Group LLC, Wiley Rein LLP, Rice Hadley Gates LLC and other entities hired to provide "education/engagement" services because of confidentiality obligations in the contracts. U.S. law would also not cover interactions between ICANN and other governments. If the ICANN community is to be in a position to hold ICANN accountable post-transition, it needs to be fully informed of its activities and interests.

*Question 2.* Should this important work have been punted to Work Stream 2?

Answer. Early on, the ICANN community identified a number of serious reforms that it deemed critical to make ICANN accountable. However, it was clear that not all of the reforms could be fully developed or implemented under the original projected deadline for the transition of September 2015. Therefore, the ICANN cross community working group on accountability divided the reforms into "Work Stream 1" reforms that had to be in place prior to the transition and "Work Stream 2" reforms that could be implemented after the transition. The difference between the two was not their importance, but whether or not they directly involved replacing the U.S. role in the IANA process. It is very unfortunate that an artificial, political deadline drove this division in ICANN reforms. In my opinion, the U.S. should have required all reforms to be implemented prior to the transition.

*Question 3.* What assurances are there that greater transparency such as this will be effectuated if the transition was to occur before the work is done?

Answer. There is a commitment to implementing Work Stream 2 reforms written into the bylaws, but it is a broad commitment that could result in significant reforms or cosmetic reforms. A major reason why the ICANN Board has been willing to accept Work Stream 1 accountability measures in the current proposal is that the U.S. Government has said that the transition is dependent on their adoption. Even then, the Board has been recalcitrant at times and forced the community to retreat from reforms that it sought. After the transition, the ICANN Board will likely be less accommodating to community demands for greater accountability and transparency. We could see a similar dynamic post-transition with the community backing down in the face of Board opposition and settling for minimal reforms. Adding to this concern is the fact that ICANN has significantly curtailed the budget for independent legal advice for Work Stream 2 versus Work Stream 1. In short, there is reason to doubt that the Work Stream 2 reforms will be implemented to the level desired by the much of the ICANN community as expressed during the past two years. An extension of the contract would place the ICANN community in a much stronger position to demand full implementation of Work Stream 2 reforms.

*Question 4.* What other issue have been punted to Work Stream 2 that you see potential problem with?

Answer. Important issues yet to be settled include the nature and extent of ICANN's commitment to human rights and making ICANN more transparent to the community, which I discussed in my testimony.

More recent events have illustrated the importance of stronger accountability for the ICANN Board and staff. In a July 29 declaration, an Independent Review Panel (an arbitral panel for dispute resolution) condemned ICANN for its actions involving applications for domains by a company called Dot Registry. The panel found that ICANN legal staff inappropriately intervened in the report of an independent evaluator. Then it found that the Board Governance Committee, or BGC (the body responsible for responding to requests for reconsideration of board decisions and administering ICANN's conflict of interest policy), repeatedly failed to do its job. Its decisions were described as "cavalier" and "simply not credible."



According to the panel, “ICANN failed to apply the proper standards in the reconsiderations at issues, and that the actions and inactions of the board were inconsistent with ICANN’s Articles of Incorporation and Bylaws.” Specifically, the Board “failed to exercise due diligence and care,” “failed to fulfill its transparency obligations,” and the evidence did “not support a determination that the board (acting through the BGC) exercised independent judgement in reaching the reconsideration decisions.” These are serious governance flaws that need to be addressed, but have been largely deferred to Work Stream 2.

Another issue in Work Stream 2 that could have serious implications is the issue of ICANN’s jurisdiction of incorporation, which remains an issue of dispute. ICANN’s bylaws state that “the principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California, United States of America.” However, ICANN’s principal office and place of incorporation can be changed and some participants in the Work Stream 2 discussions have been very vocal in their desire to move ICANN out of the U.S., which could have far-reaching implications.

Foreign governments have already pushed for regulatory control of the Internet by the United Nations or a governmental regime.

*Question 5.* How much will the transition be able to reverse the thinking of governments that are already in favor of this governance?

Answer. Not at all. Governments like Russia, China, and Iran will always prefer more government control over the Internet. That is easiest to achieve through U.N. or International Telecommunication Union (ITU) governance of the Internet and they will continue to press for that outcome. That was never going to change regardless of the transition. How many governments are in this group? At the 2012 WCIT conference, 89 countries voted in favor of granting the ITU a role in Internet governance versus 55 countries that voted against the proposal.

The NTIA has argued that the transition announcement has eroded this support. In July, Assistant Secretary Strickling stated that “almost 30 of [the 89 countries supporting U.N. governance of the Internet in 2012] have now demonstrated their support for multistakeholder governance of the domain name system by joining in the Governmental Advisory Committee’s [GAC’s] consensus position to move the transition proposal forward.” This means that roughly 60 countries continue to oppose the multistakeholder model.

But more fundamentally, support for the transition proposal in the GAC does not ipso facto mean that those governments would not prefer U.N. governance of the Internet. It could mean that they support ending the U.S. contractual relationship with ICANN and see it as an avenue toward asserting ITU governance of the Internet. In other words, the long-term impact of the transition on government positions vis-à-vis U.N. governance of the Internet is unknown.

*Question 6.* Will a delay in the transition, to ensure accountability, push these foreign governments to abandon the multi-stakeholder model altogether or will it do more to prevent these governments from abusing it?

Answer. In my opinion, it is unlikely that countries supportive of the multistakeholder model would abandon it. For years, the U.S. had worked with like-minded countries to resist efforts to have the International Telecommunication Union (ITU) assume a role in Internet governance. In the 2012 WCIT conference, 89 countries voted in support of a proposal to have the ITU assume some authority over the Internet. NTIA believes that the transition announcement convinced some 30 countries to reconsider their position. However, 54 countries voted with the U.S. at the WCIT to oppose the proposal to have the ITU assume some authority over the Internet. As far as I know, there has been no significant shift in the position of countries that support of the multistakeholder model since the WCIT. If the U.S. said that it remained committed to the transition, but wanted more time to fully vet the proposal, I believe that these countries would remain supportive of the multistakeholder model.